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## What if the International Criminal Court Could Prosecute President al-Assad for the Chemical Weapon Attacks in Ghouta?

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# RECENT DEVELOPMENT

## WHAT IF THE INTERNATIONAL CRIMINAL COURT COULD PROSECUTE PRESIDENT AL-ASSAD FOR THE CHEMICAL WEAPON ATTACKS IN GHOUTA?

PAUL CHO\*

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## I. EXECUTIVE SUMMARY

In the early morning of August 21, 2013, one of the deadliest chemical weapon attacks seen in modern times was launched against urban neighborhoods in the Damascus area. Resulting in numerous civilian casualties, the attack has since been categorically condemned by the international community as constituting war crimes and crimes against humanity. This paper contemplates a hypothetical prosecution of its alleged mastermind, President Bashar al-Assad of the Syrian Arab

Republic, under the auspices of the International Criminal Court. After an examination of the publically available evidence, the court's jurisdictional authority is surveyed and observed to extend over al-Assad. This is followed by exploring possible charges by the prosecution, to see which ones are viable enough to survive to conviction. The most viable of them, would likely be: (1) the crime against humanity of extermination; (2) the war crime of attacking civilians; and (3) the war crime of employing prohibited gases, liquids, materials or devices. Liability is very likely to attach for each of these offenses, either because al-Assad directly ordered the attacks, or through the doctrine of superior responsibility.

## II. INTRODUCTION

Sometime between December 28 and December 29, 2016, a ceasefire was declared between the major hostile parties in the Syrian Arab Republic.<sup>1</sup> Russia's promises to scale back its military presence could provide enough trust between the combatants and lead toward an eventual peaceful resolution to the volatile conflict.<sup>2</sup> However, with a lasting ceasefire comes the question of whether to allow President al-Assad's regime to continue. As part of answering such a question, the international community will face the dilemma of whether a peaceful and stable world order requires prosecution of individuals, including President al-Assad, for the many international crimes that took place over the course of the conflict. Among the most notable and well-documented of these is the chemical weapon attacks at Ghouta.

On August 21, 2013, the early morning silence was suddenly pierced by the sound of screaming rockets in the Ghouta region south and east of central Damascus.<sup>3</sup> The first attack struck Ein Tarma, followed minutes later by rocket detonations in Zamalka, both districts within miles of central Damascus (Eastern Ghouta).<sup>4</sup> A subsequent rocket attack struck

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1. Angela Dewan, *Syria Civil War: New Nationwide Ceasefire Underway*, CNN (Dec. 29, 2016, 9:51 PM), <http://www.cnn.com/2016/12/29/middleeast/syria-ceasefire-talks-turkey-russia/> [https://perma.cc/LXN5-H72N].

2. *Id.*

3. *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013), <http://www.bbc.com/news/world-middle-east-23927399> [https://perma.cc/MX2Y-P6S8] [hereinafter *Syria Chemical Attack: What We Know*].

4. *Id.*

Moadamiyah (Western Ghouta), a small town west of Zamalka, several hours later.<sup>5</sup> The death toll total ranged from 300 to 1,300 people.<sup>6</sup> What was most horrifying about these attacks was that the rockets employed were determined to be carrying chemical payloads of the nerve agent, Sarin gas.<sup>7</sup> Due to prior allegations of the use of chemical weapons, a U.N. team of experts<sup>8</sup> (U.N. Mission) was already present in the war-torn country by invitation of the Syrian government.<sup>9</sup> Having arrived only days prior, the U.N. Mission was initially tasked with conducting on-site

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5. *Id.*

6. *Id.* The main opposition alliance claimed the death toll was 1,300; Médecins Sans Frontières recorded 355 deaths out of 3,600 patients affected; the Syrian Observatory for Human Rights confirmed conservatively 502 deaths; the Violations Documentations Center in Syria listed and mostly named 588 deaths, including 108 children and 135 women; and the United States government determined preliminarily that 1,429 (including 426 children) had died as a direct result of the attacks. *Id.*

7. U.N. Mission to Investigate Allegations of the Use of Chem. Weapons in the Syrian Arab Republic, Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, U.N. Doc. A/67/997-S/2013/553, at 8 (Sept. 16, 2013) [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2013\\_553.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_553.pdf) [<https://perma.cc/TML5-4NUQ>] [hereinafter U.N. Mission Report – Ghouta].

8. The U.N. team of experts was comprised of members of the World Health Organization (WHO) and the Organization for the Prohibition of Chemical Weapons (OPCW). *Id.* at 4.

9. *Id.* at 4–6. The Syrian government alleged that the March 19 chemical weapon attack on Khan al-Assal was conducted by “armed terrorist groups” via a rocket launched five kilometers away. U.N. Mission to Investigate Allegations of the Use of Chem. Weapons in the Syrian Arab Republic, Final Report, at 2 (Dec. 12, 2013) <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/12/report.pdf> [<https://perma.cc/MG4F-FT6W>] [hereinafter U.N. Mission – Final Report]. Upon impact, the rocket released a cloud of smoke that rendered persons exposed unconscious. *Id.* at 3. The smoke was reported to have caused 25 deaths and injury to more than 100 individuals. *Id.* As the site of the attack was in the immediate vicinity of a Syrian military position, a number of the dead and injured were soldiers of the Syrian government. *Id.* at 2–3. On March 19, following the attack, the Syrian government formally reported the incident to the U.N. and blamed foreign-backed rebel forces. *Id.* The very next day, the Syrian government requested the U.N. Secretary-General to establish and send an independent U.N. mission to investigate. *Id.* at 3. Over the next few months, however, numerous nations including the United States, the United Kingdom, and France, submitted letters to the Secretary-General reporting other chemical weapon attacks by the Syrian government both before and after the Khan al-Assal incident, including the incident at Ghouta. *Id.* Investigating seven of the sixteen allegations, the U.N. Mission conclusively found chemical weapons—particularly Sarin—were repeatedly used in the conflict, and in at least one case, by “clear and convincing evidence” and were used indiscriminately on a large scale in the Ghouta incident. *Id.* at 10–21. Other incidents, although yielding ample evidence of the use of Sarin gas, did not satisfy the fact-finding evidentiary standard of the U.N. Mission. *Id.*

inspections for prior allegations of chemical weapons use.<sup>10</sup> Upon request by U.N. Secretary-General Ban Ki-moon, however, the team was quickly diverted to the Ghouta region to begin on-site inspections on August 25, 2013.<sup>11</sup> In a subsequent visit, the U.N. Mission also investigated other alleged uses of chemical weapon incidents including Khan al-Assal (March 19, 2013); Saraqueb (April 29, 2013); Sheikh Maqsood (April 13, 2013); Bahhariyeh (August 22, 2013); Jobah (August 24, 2013) and Ashrafiah Sahnaya (August 25, 2013).<sup>12</sup> Although nearly all of the investigated instances yielded “credible information” that chemical weapons (Sarin) had been used, the Ghouta investigation found “clear and convincing evidence that chemical weapons were also used against civilians, including children, on a relatively large scale.”<sup>13</sup>

On September 14, 2013, although they were already signatories to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gasses, and of Bacteriological Methods of Warfare (Geneva Protocol),<sup>14</sup> the Syrian Arab Republic, motivated by a horrified international reaction and threat of imminent foreign military

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10. *Id.* at 2–8.; see Ambassador Bashar Ja’afari, Identical Letters dated 19 Mar. 2013 from the Permanent Representative of the Syrian Arab Republic to the U.N. addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/172, at 1–2 (Mar. 19, 2013) (reporting to the U.N. that rebel “terrorists” backed by foreign countries were responsible for a chemical weapon attack in Khan al-Assal on March 19, 2013).

11. U.N. Mission – Final Report, *supra* note 9, at 7–8. In order to conduct their investigation, the U.N. Mission had to negotiate a ceasefire with both the Syrian government and rebel factions that took place at certain hours of the day for the areas they inspected or visited. *Id.* at 8. The inspection team was faced with continuing threats of harm including one instance of sniper attack throughout their investigation. U.N. Mission Report – Ghouta, *supra* note 7 at 6.

12. U.N. Mission – Final Report, *supra* note 9, at 10–18.

13. *Id.* at 19.

14. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gasses, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 66–94 [hereinafter Geneva Protocol]; see also Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gasses, and of Bacteriological Methods of Warfare: Status of the Treaty, U.N. Office for Disarmament Affairs, <http://disarmament.un.org/treaties/t/1925> [<https://perma.cc/8YYN-TA53>] (showing Syria’s accession to the Geneva Protocol on December 17, 1968). French intelligence also reported the Syrian government exhibited a “clear willingness to destroy any evidence *a posteriori*” by causing intentional delay to the U.N. Mission. FRANCE DIPLOMATIE – MINISTRY OF FOREIGN AFFAIRS AND INT’L. DEV., SYRIA/SYRIAN CHEM. PROGRAMME – NAT’L EXEC. SUMMARY OF DECLASSIFIED INTELLIGENCE (Sept. 3, 2013), [http://www.diplomatie.gouv.fr/IMG/pdf/Syrian\\_Chemical\\_Programme.pdf](http://www.diplomatie.gouv.fr/IMG/pdf/Syrian_Chemical_Programme.pdf) [<https://perma.cc/Y5AP-KXD3>] [hereinafter FRANCE DIPLOMATIE].

intervention,<sup>15</sup> acceded to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention).<sup>16</sup> On December 2, 2013, however, Navi Pillay, then U.N. High Commissioner for Human Rights, declared the U.N. had evidence of war crimes and crimes against humanity authorized at the "highest level," including President Bashar al-Assad.<sup>17</sup>

This paper intends to explore a possible prosecutorial case against Syria's President Bashar al-Assad. Part III will focus on the evidence thus far publically available from the Ghouta attacks for the purpose of prosecuting President al-Assad for war crimes and crimes against humanity. Part IV will explore what methods and options the International Criminal Court (ICC) has in interpreting its law and how precedent may be utilized to overcome first impression problems faced by the Court. Part V will analyze the possible charges the ICC might utilize. Part VI will look at their viability in light of the question of double jeopardy. Part VII will examine how President al-Assad might be liable under the doctrine of superior responsibility if direct liability cannot be established. Lastly, Part VIII will be comprised of concluding statements.

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15. The United States' threat of military intervention in response to Syrian use of chemical weapons was averted at the last minute by a Russian diplomatic effort persuading al-Assad to agree to surrender all Syrian chemical weapon stockpiles for destruction. Patrice Taddonio, "The President Blinked": Why Obama Changed Course on the "Red Line" in Syria, PBS FRONTLINE (May 25, 2015), <http://www.pbs.org/wgbh/frontline/article/the-president-blinked-why-obama-changed-course-on-the-red-line-in-syria/> [<https://perma.cc/54R9-XE5D>].

16. Convention on the Prohibition of the Dev., Prod., Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 3, 6, 317 [hereinafter Chemical Weapons Convention]; see also ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, STATUS OF PARTICIPATION IN THE CHEMICAL WEAPONS CONVENTION AS OF 14 OCTOBER 2013, at 6 (Oct. 14, 2013), [https://www.opcw.org/fileadmin/OPCW/S\\_series/2013/en/s-1131-2013\\_e\\_.pdf](https://www.opcw.org/fileadmin/OPCW/S_series/2013/en/s-1131-2013_e_.pdf) [<https://perma.cc/TKG6-JK55>] (listing Syria as acceding to the Convention by depositing an instrument of ratification with the Depositary on September 14, 2013).

17. UN Implicates Bashar al-Assad in Syria War Crimes, BBC NEWS (Dec. 2013), <http://www.bbc.com/news/world-middle-east-25189834> [<https://perma.cc/P6XX-BSFZ>]. ("The UN's commission of inquiry into Syria has produced 'massive evidence . . . [of] very serious crimes, war crimes, crimes against humanity,' Ms. Pillay said."); see also Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic on Its Twenty-Fifth Session, U.N. Doc. A/HRC/25/65, at 1 (Feb. 12, 2014), [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_hrc\\_25\\_65.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_25_65.pdf) [<https://perma.cc/X7CR-X4CH>] [hereinafter U.N. Indep. Int'l Comm'n Rep.] (detailing numerous repeated violations of international law including the use of prohibited chemical weapons, war conduct disregarding international conventions regarding non-combatants, indiscriminate targeting during military operations, and unlawful killings).

### III. THE EVIDENCE FROM GHOUTA

The U.N. Mission visited the individual sites of the Ghouta attacks, Moadamiyah, Ein Tarma, and Zamalka, within a week of the fateful incident.<sup>18</sup> As part of their on-site investigations, the U.N. Mission interviewed both survivors and witnesses, examined the remains of the munitions used during the attack, collected environmental samples, examined survivors for symptoms, and took samples of hair, blood, and urine for subsequent analysis.<sup>19</sup> During their investigation, the team of experts adhered to “stringent protocols” and operating procedures in gathering evidence and testimony “to withstand future scrutiny.”<sup>20</sup> These protocols were pursuant to established WHO and OPCW standards and were also in accordance with U.N. Guidelines.<sup>21</sup>

#### A. *Weather at the Time of the Incident*

In its report, the U.N. Mission noted the choice of optimal weather conditions on August 21 for the chemical attack.<sup>22</sup> Between 2:00 AM and 5:00 AM, air temperature was falling, causing air to move downward toward the ground.<sup>23</sup> Atmospheric conditions, therefore, preserved any chemical gases—especially heavier chemical gases—by keeping them closer to the ground instead of allowing them to dissipate into the atmosphere.<sup>24</sup> Furthermore, since this effected a more two-dimensional dispersion of chemical gas (rather than a three-dimensional dispersion), the gas had an increased area of effect and penetration of building interiors.<sup>25</sup>

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18. U.N. Mission Report – Ghouta, *supra* note 7, at 5.

19. *Id.*

20. *Id.*

21. *Id.* at 4; see U.N. Secretary-General, *Chemical and Bacteriological (Biological) Weapons*, U.N. Doc. A/44/561, at 11–12 (Oct. 4, 1989) (adopting and detailing the U.N. Guidelines and Procedures for the Timely and Efficient Investigation of Reports of the Possible Use of Chemical and Bacteriological (Biological) or Toxin Weapons); see also U.N. Mission Report – Ghouta, *supra* note 7, at 11–12 (listing the standard operating procedures and guidelines for evidence collection, documentation, chain of custody, packing of off-site samples, laboratory preparation and analysis, managing inspection laptops, and the handling of confidentiality).

22. U.N. Mission Report – Ghouta, *supra* note 7, at 7.

23. *Id.*

24. *Id.*

25. *Id.*



This maximized the potential exposure of people seeking shelter in the "lower levels of buildings" from bombs and artillery fire.<sup>26</sup>

## B. *Evidence Regarding the Munitions Used*

### 1. *Rockets Used at Western Ghouta*

At several impact sites, the U.N. Mission also examined the remains of several surface-to-surface rockets suspected of being responsible for the atrocity.<sup>27</sup> At Moadamiyah, one of the rocket motors was found intact after surviving initial impact with a second story wall, somehow becoming separated from the warhead.<sup>28</sup> The component, painted in light gray, was marked with numbers in black on its exterior: "97-179."<sup>29</sup> On the engine's bottom ring, the following was also engraved: "Т И III 4 25 - 6 7 - 179 K."<sup>30</sup> The engine itself had ten jet nozzles positioned in a concentric pattern with an "electrical contact plate in the middle."<sup>31</sup> Based on U.N. evidence, the Human Rights Watch determined the munition to be a 140mm M-14 rocket of Soviet design.<sup>32</sup> According to a declassified U.S. munitions catalogue, there were only three types of warheads produced for M-14 rockets.<sup>33</sup> One of them is for Sarin gas.<sup>34</sup> Moreover, the Human

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26. *Id.* According to the Human Rights Watch, the timing of the attack for the Moadamiyah area was "shortly after the completion of the Muslim morning prayer." HUMAN RIGHTS WATCH, *ATTACKS ON GHOUTA: ANALYSIS OF ALLEGED USE OF CHEMICAL WEAPONS IN SYRIA*, AT 4 (Sept. 2013) [hereinafter HRW – ANALYSIS ON GHOUTA].

27. U.N. Mission Report – Ghouta, *supra* note 7, at 7, 21–26.

28. *Id.* at 21.

29. *Id.*

30. *Id.*

31. *Id.*

32. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 5.

33. *Id.* at 5 (citing U.S. Defense Intelligence Agency and U.S. Army Intelligence Agency, *Ammunition Data and Terminal Effects Guide – Eurasian Communist Countries*, DST-1160Z-126-92 (Mar. 5 1992) ("[P]artially declassified and released to Human Rights Watch via FOIA request."). The other possible warheads for an M-14 Rocket are the M-14-OF high explosive-fragmentation warhead, and the M-14-D smoke-containing-white-phosphorus warhead. *Id.* The use of white phosphorus can be considered a chemical weapon if the substance is intended to be used to "cause harm or death through the toxic properties of the chemical." Paul Reynolds, *White Phosphorus: Weapon on the Edge*, BBC NEWS (Nov. 16, 2005, 11:25 PM), <http://news.bbc.co.uk/2/hi/americas/4442988.stm> [<https://perma.cc/ZSN4-HDMA>] (quoting Peter Kaiser, spokesman for the Organization for the Prohibition of Chemical Weapons). However, it can still be used to produce camouflage smoke without violating the Chemical Weapons Convention. *Id.*

34. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 5. The electric contact plate in the rocket motor found at Moadamiyah is a "unique identification characteristic" of the M-14 Rocket. *Id.* Furthermore, the 179 markings on both the ring and the exterior indicate it was produced in

Rights Watch also noted the M-14 rocket was present in the Syrian arsenal in large part due to numerous conveyances from the Soviet Union to Syria during 1967–1969.<sup>35</sup>

## 2. Rockets Used at Eastern Ghouta

At Zamalka and Ein Tarma, the U.N. Mission identified remnants of rockets common to both sites.<sup>36</sup> Furthermore, the rocket design used for both Zamalka and Ein Tarma were “consistent with that of an unguided rocket.”<sup>37</sup> Although some of the remains were “deformed on impact,” the U.N. investigators were able to determine that the designs were capable of a maximum liquid payload capacity of approximately fifty-six liters.<sup>38</sup> The engine itself had six stabilizer fins with a circular, stabilizing metal ring around them.<sup>39</sup> The Human Rights Watch analysis of the U.N. data concluded the rockets used in the Eastern Ghouta region were 330mm surface-to-surface rockets.<sup>40</sup> The analysis highlighted the rockets’ 330mm diameter because they could only be launched from uniquely Iranian-made rocket launchers.<sup>41</sup> In terms of the 330mm rockets’ origin, however, the analysis concluded that, unlike the M-14 rockets, the rockets used at Zamalka and Ein Tarma were most likely of Syrian origin and industrially produced.<sup>42</sup> The Human Rights Watch concluded the

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Novosibirsk at “Factory 179”—“one of the largest producers of artillery and rockets during the Soviet period, and a known manufacturer of the 140mm M-14 rocket.” *Id.* The Human Rights Watch estimates that this type of rocket is capable of carrying 2.2 liters of liquid. *Id.*

35. *Id.* at 5.

36. U.N. Mission Report – Ghouta, *supra* note 7, at 22.

37. *Id.*

38. *Id.* at 22, 24. The Human Rights Watch separately determined that the chemical payload of the rockets used in Eastern Ghouta would range from 50–60 liters compared to the 2.2-liter payload of the Moadamiyah rockets. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 9.

39. U.N. Mission Report – Ghouta, *supra* note 7, at 23.

40. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 7–9.

41. *Id.* at 9–12. The Iranian-made rocket launcher, the Falaq-2, is unique to Iran as it is “the only country in the world to produce rocket launchers in the 333mm category.” *Id.* at 9. Numerous instances of Syrian governmental forces utilizing the Falaq-2 to launch 330mm rockets have been well-documented in Internet videos. *Id.*

42. *Id.* at 12. The 330mm rocket has not been observed prior to the beginning of the Syrian conflict. *Id.* at 9. However, based on video documentation since the conflict began, it is believed the 330mm rocket was designed for relatively short ranges and not for accuracy. *Id.* at 12. Informally referred to as “Volcano” rockets, the 330mm rocket design is similar to the Iranian Falaq series design in that it trades its maximum potential range (and accuracy) in exchange for a larger (and more

Zamalka and Ein Tarma rockets were specifically designed for delivering chemical weapons in direct violation of the Chemical Weapons Convention.<sup>43</sup>

### 3. Probable Trajectories of Both Sets of Rockets

Probable trajectories were also calculated based on two impact sites: one in Moadamiyah and one in Ein Tarma.<sup>44</sup> The U.N. Mission determined the original azimuth<sup>45</sup> of the 140mm M-14 rockets to be approximately 215 degrees.<sup>46</sup> The U.N. Mission Discovered the 330mm rockets found at Zamalka and Ein Tarma had an azimuth of 105 degrees.<sup>47</sup> By analysis, the Human Rights Watch established that the 140mm M-14 rocket has a

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destructive) payload. N.R. JENZEN-JONES ET AL., ARMAMENT RES. SERVS. PTY. LTD., IRANIAN FALAQ-1 AND FALAQ-2 ROCKETS IN SYRIA, ARES, at 11 (May 2014), <http://www.armamentresearch.com/wp-content/uploads/2014/01/ARES-Research-Report-No.2-Iranian-Falaq-1-Falaq-2-Rockets-in-Syria.pdf> [<https://perma.cc/8274-G3KN>]. For comparison purposes, however, the Falaq-2 rocket, with a similar diameter, has a maximum range of up to 10.8 km. *Id.* at 18.

43. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 12. The 330mm rocket has been observed in the Syrian conflict to exist in two variants. *Id.* The first variant contains a high-explosive warhead and is 400mm longer than the rockets found at Zamalka and Ein Tarma. *Id.* On the other hand, the Zamalka and Ein Tarma rockets (the chemical weapons variant) has an additional plug used to insert chemical agent into the warhead payload compartment. *Id.* As this variant is “industrially produced,” it is evident they were specifically designed for use as a chemical weapon as opposed to being jury-rigged in the field. *Id.* The non-aerodynamic form of the rocket is also consistent with its chemical weapon function, as non-aerodynamic forms are not designed for accuracy. *Id.* Additionally, based on prior alleged chemical weapon attacks compared to conventional artillery attack videos, the chemical weapons variant is marked with identification numbers in red, whereas the high-explosive variant is numbered in black lettering. *Id.* All of the rockets found at Zamalka and Ein Tarma were numbered in red and had shorter warheads, indicating they were all of the chemical weapons variety. *Id.* Finally, evidence strongly suggests that none of the opposition forces or sub-groups possess the 330mm rocket or the Falaq-2 launcher system as part of their arsenal. *Id.*

44. The U.N. mission's report explained its analysis of the rockets' trajectory:

Of the five impact sites investigated by the Mission, three do not present physical characteristics allowing a successful study of the trajectories followed by the rockets involved, due to the configuration of the impact places. However, Impact site number 1 (Moadamiyah) and Impact site number 4 (Ein Tarma) provide sufficient evidence to determine, with a sufficient degree of accuracy, the likely trajectory of the projectiles.

U.N. Mission Report – Ghouta, *supra* note 7, at 25.

45. Azimuth is calculated as the number of angular degrees in a clockwise rotation from due north. *Azimuth*, AM. HERITAGE C. DICTIONARY (4th ed. 2002).

46. Impact site number 2, only 65 meters away, likewise had an azimuth of 214 degrees. U.N. Mission Report – Ghouta, *supra* note 7, at 26. The variance of a single degree between the two sites was attributed to a well-documented dispersion characteristic of rocket launchers. *Id.*

47. *Id.*

minimum range of 3.8 kilometers and a maximum of 9.8 kilometers.<sup>48</sup> Assuming the 330mm rocket's range is not substantially different,<sup>49</sup> the respective azimuths combined with effective ranges intersect at the Syrian government-controlled military base for the 104th Brigade of the Republican Guard.<sup>50</sup>

#### 4. The Presence of Sarin Gas

As stated above, the U.N. Mission concluded "clear and convincing evidence" shows the use of Sarin gas in the Ghouta attacks.<sup>51</sup> Samples from rockets' parts found at all three sites were taken and subsequently analyzed at OPCW-designed laboratories.<sup>52</sup> A majority of them tested positive for the presence Sarin or its by-products.<sup>53</sup> The U.N. Mission also obtained and analyzed thirty environmental samples from all three sites in the course of their investigation.<sup>54</sup> These samples ranged from soil samples, samples of debris, clothing and fabric samples, and wipe samples.<sup>55</sup> Subsequent laboratory analysis confirmed the presence of Sarin in the majority of these samples.<sup>56</sup>

Out of eighty survivors matching the U.N. Mission's criteria, thirty-six were selected for diagnosis by the team's medical experts.<sup>57</sup> Consistent

48. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 6.

49. For the purposes of trajectory and calculating potential points of origin, it is probably safe to assume the 330mm rocket, utilizing a similar design philosophy as the Falaq-2, has a maximum effective range that does not extend beyond 10 kilometers. See JENZEN-JONES, *supra* note 42, at 11, 15, 18 (comparing the Falaq-2 rocket to the "Volcano" rocket in its design philosophy).

50. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at iv–v; see also *Syria Chemical Attack: What We Know*, *supra* note 3 (showing a map of the region outlining the M-14 rocket's potential launch points based on effective range, its azimuth, and the 330mm rocket azimuth all converging on the military base designated for the 104th Brigade of the Republican Guard). The Human Rights Watch analysis of the effective range for the M-14 rocket is based on a declassified U.S. intelligence reference guide on munitions. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 6 (citing U.S. Defense Intelligence Agency and U.S. Army Intelligence Agency, *Ammunition Data and Terminal Effects Guide – Eurasian Communist Countries*, DST-1160Z-126-92 (Mar. 5, 1992)) ("[P]artially declassified and released to Human Rights Watch via FOIA request.").

51. U.N. Mission Report – Ghouta, *supra* note 7, at 8.

52. *Id.* at 7.

53. *Id.* at 7, 23.

54. *Id.* at 7, 27–37.

55. *Id.*

56. *Id.*

57. *Id.* at 7.

with exposure to Sarin gas, 78% experienced loss of consciousness, 61% experienced shortness of breath, 42% had blurred vision, 22% had irritation or inflammation of the eyes, 22% salivated excessively, 22% experienced vomiting, and 19% reported convulsions or seizures.<sup>58</sup> Thirty-four of these patients were also selected to provide blood, urine, and hair samples.<sup>59</sup> These samples, upon separate laboratory testing, returned dispositive confirmation that Sarin gas was employed in the Ghouta attacks.<sup>60</sup>

Interviews of survivors and treating medical clinicians were also consistent with the presence of Sarin.<sup>61</sup> First responders—including nine nurses and seven physicians—reported seeing “a large number of ill or deceased persons lying in the streets without external signs of injury.”<sup>62</sup> “Those who went to assist other community members described seeing a large number of individuals lying on the ground, many of whom were deceased or unconscious.”<sup>63</sup> These witnesses consistently reported symptoms of those frequently associated with Sarin exposure.<sup>64</sup> “Several of these ‘first responders’ also became ill . . . .”<sup>65</sup> Furthermore, of the survivors interviewed, 70% had lost two family members or more.<sup>66</sup> In one tragic instance, two brothers reported being the only survivors from forty family members all living in the same building.<sup>67</sup>

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58. *Id.* at 7.

59. *Id.* at 7, 14–18.

60. *Id.* The samples were tested in separate independent laboratories and produced results with only minor variances. *Id.* at 18. When divided between Moadamiyah and Zamalka, the Moadamiyah blood samples were 100% positive at Laboratory 4 and 94% positive for Laboratory 3. *Id.* 91% of the Zamalka blood samples tested positive for Laboratory 4 and for Laboratory 3, they were 85% positive. *Id.* The urine samples had only minor divergences when divided by the attack sites. *Id.* 100% of the urine samples tested positive for Sarin from Moadamiyah while only 91% were positive from Zamalka. *Id.* Between the high percentages returned from different sites and the presence of only a slight variance between independent laboratories, there is little to no doubt as to the presence of Sarin at the scenes of the attacks. *Id.* at 7.

61. *Id.* at 19.

62. *Id.*

63. *Id.*

64. *Id.* “Survivors reported a military attack with shelling, followed by the onset of a common range of symptoms, including shortness of breath, disorientation, rhinorrhea (runny nose), eye irritation, blurred vision, nausea, vomiting, general weakness and eventual loss of consciousness.” *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

### C. *Evidence Gathered by Intelligence Agencies*

Multiple intelligence agencies arrived at conclusions with “high confidence” that are consistent with each other regarding the Syrian government’s responsibility for the Ghouta attacks.<sup>68</sup> United States intelligence services, relying on “human, signals, and geospatial intelligence as well as a significant body of open source reporting,” reported “[m]ultiple streams of intelligence indicate that the regime executed a rocket and artillery attack” on Ghouta.<sup>69</sup> U.S. satellite detections further corroborated the source of the attacks originated from a “regime-controlled area.”<sup>70</sup> The United States also reported that members of the Syrian chemical weapons organization<sup>71</sup> were observed operating in the area—near a known chemical weapons mixing site—from three days prior till the morning of the attack.<sup>72</sup> Furthermore, the U.S. reported observing “a Syrian regime element prepar[ing] for a chemical weapons attack in the Damascus area, including through the utilization of gas masks.”<sup>73</sup> With regard to the Syrian government’s motivation for the attack, the United States assessed the following:

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68. FRANCE DIPLOMATIE, *supra* note 14; CHAIRMAN JON DAY, JOINT INTELLIGENCE COMM., SYRIA: REPORTED CHEMICAL WEAPONS USE (Aug. 29, 2013) (UK), [http://www.gov.uk/government/uploads/attachment\\_data/file/235094/Jp\\_115\\_JD\\_PM\\_Syria\\_Reported\\_Chemical\\_Weapon\\_Use\\_with\\_annex.pdf](http://www.gov.uk/government/uploads/attachment_data/file/235094/Jp_115_JD_PM_Syria_Reported_Chemical_Weapon_Use_with_annex.pdf) [<https://perma.cc/62C8-2ZWZ>] [hereinafter JOINT INTELLIGENCE COMM.]; Press Release, Office of the Press Sec’y, White House, Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august21> [<https://perma.cc/FB35-9Z5Z>] [hereinafter Office of the Press Secretary].

69. Office of the Press Secretary, *supra* note 68.

70. *Id.*

71. *Id.* “The Syrian Scientific Studies and Research Center—which is subordinate to the Syrian Ministry of Defense—manages Syria’s chemical weapons program.” *Id.* According to a French intelligence assessment:

[T]he Syrian military responsible for filling munitions with chemical agents and for security at storage sites—“Branch 450” of the Syrian Scientific Studies and Research Centre (CERS)—was staffed only by members of the president’s Alawite sect and was “distinguished by a high level of loyalty to the regime.” Bashar al-Assad and certain members of his inner circle were the only ones permitted to give the order for the use of chemical weapons . . . .

*Syria Chemical Attack: What We Know*, *supra* note 3.

72. Office of the Press Secretary, *supra* note 68.

73. *Id.*

The Syrian regime has initiated an effort to rid the Damascus suburbs of opposition forces using the area as a base to stage attacks against regime targets in the capital. The regime has failed to clear dozens of Damascus neighborhoods of opposition elements, including neighborhoods targeted on August 21, despite employing nearly all of its conventional weapons systems. We assess that the regime's frustration with its inability to secure large portions of Damascus may have contributed to its decision to use chemical weapons on August 21.<sup>74</sup>

Perhaps even more damning evidence involves the interception of communications by U.S. intelligence concerning the attack and corresponding subsequent action by the Syrian government forces:

We intercepted communications involving a senior official intimately familiar with the offensive who confirmed that chemical weapons were used by the regime on August 21 and was concerned with the U.N. inspectors obtaining evidence. On the afternoon of August 21, we have intelligence that Syrian chemical weapons personnel were directed to cease operations. At the same time, the regime intensified the artillery barrage targeting the neighborhoods where chemical attacks occurred. In the 24 hour period after the attack, we detected indications of artillery and rocket fire at a rate approximately four times higher than the ten preceding days. We continued to see indications of sustained shelling in the neighborhoods up until the morning of August 26.<sup>75</sup>

A British intelligence services report confirmed the conclusions of the United States in attributing liability to the Syrian regime with the "highest possible level of certainty."<sup>76</sup> "Permission to authori[z]e [chemical weapons] has probably been delegated by President As[s]ad to senior regime commanders, such as [\*], but any deliberate change in the scale and nature of use would require his authorization."<sup>77</sup> Moreover, British intelligence emphasized that opposition forces were not capable of such an

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74. *Id.*; see JOINT INTELLIGENCE COMM., *supra* note 68 (concurring the attacks "were conducted to help clear the Opposition from strategic parts of Damascus").

75. Office of the Press Secretary, *supra* note 68.

76. JOINT INTELLIGENCE COMM., *supra* note 68, at 1–2.

77. *Id.* "[\*]" denotes redaction of certain senior commanders in the Syrian regime. *Id.* Presumably, they have been redacted to protect the confidentiality of sensitive sources of information and the possibility of potential prosecution of these individuals. *Id.*

attack due to its unprecedented scale, tactical coordination, and the lack of possession of such weapons.<sup>78</sup>

The U.S. findings were also independently verified by a French intelligence report utilizing mostly “French-only sources.”<sup>79</sup> Their report, after detailing the history of the Syrian chemical weapons program, underlined that the Syrian regime had “one of the most important operational stockpile [of chemical weapons] in the world, without any perspective of programmed destruction in the absence of a Syrian willingness to join the CWC [Chemical Weapons Convention].”<sup>80</sup> The French report estimated that Syria’s “particularly massive and diversified” arsenal contained “[s]everal hundred tons of sulfur mustard, . . . [s]everal tens of tons of VX,<sup>81</sup> . . . and [s]everal hundreds of tons of sarin” kept in binary form.<sup>82</sup> Additionally, the report revealed that Syrian scientists were working on nitrogen mustard—a chemical agent with a “toxicity level higher than sarin”—as well as new and more efficient dispersal mechanisms.<sup>83</sup> The French report also confirmed the Syrian possession of a number of delivery systems for chemical agents.<sup>84</sup>

With regard to the attacks themselves, French intelligence concluded that the attacks were “consistent, on a military level, with the Syrian armed

78. *Id.* Russia alleged with a “good degree of confidence” that opposition forces were responsible for the attack. *Id.* However, British, U.S., and French intelligence reports independently and emphatically refuted that there was any credible evidence supporting the capability of opposition forces to pull off the attacks at Ghouta. *Id.*; FRANCE DIPLOMATIE, *supra* note 14; Office of the Press Secretary, *supra* note 68.

79. FRANCE DIPLOMATIE, *supra* note 14; Office of the Press Secretary, *supra* note 68. In addition to other findings, French intelligence independently confirmed the use of sarin gas through the observation of the final death toll, symptoms, dispersal pattern analysis, and comparisons with “impact models of chemical attack” extrapolated by specialist experts. *Id.* French intelligence discounted the possibility of opposition manipulation of the utilized information. *Id.*

80. *Id.*

81. “VX is the most toxic among the known chemical warfare agents, . . .” *Id.*

82. *Id.* Sarin is stored in the form of two distinct chemicals (binary) and then mixed just prior to use. *Id.*

83. *Id.*

84. With “thousands of launchers” available, the Syrian regime’s armed forces were reported to have: Scud C missiles (500 km), Scud B missiles (300 km), M600 missiles (250–300 km), SS21 missiles (70 km), air launched bombs, and artillery rockets (50 km or less). *Id.*; Office of the Press Secretary, *supra* note 68. In addition to other chemical agents, all of these munitions are capable of carrying sarin. FRANCE DIPLOMATIE, *supra* note 14.



forces' doctrine."<sup>85</sup> As part of their "classical tactical pattern," Syrian forces began an attack on a hostile position with a combined air and artillery bombardment—allowing for the integration of chemical weapons—followed by a ground offensive.<sup>86</sup> As observed by French intelligence, Eastern Ghouta was bombarded by conventional air and artillery units between 3:00 AM and 4:00 AM.<sup>87</sup> Similarly, chemical attacks were directed at Zalmalka, Ayn Tarma, and Kafr Batna followed by a ground offensive commencing at 6:00 AM.<sup>88</sup> Over several days following the chemical attacks, the French report observed that the Syrian regime conducted additional ground and air strikes as part of an effort to delay the U.N. Mission from being able to conduct on-site investigations.<sup>89</sup> French intelligence concluded this was also done as a means of destroying evidence.<sup>90</sup> "Furthermore, the military set off fires, aiming apparently at purifying the atmosphere thanks to the air movement generated by the intense heat."<sup>91</sup>

#### IV. THE ICC AND HOW IT CAN PROSECUTE PRESIDENT AL-ASSAD

President al-Assad, among other senior officials of the Syrian Regime, has since been accused of a long list of crimes under international law, including war crimes and crimes against humanity.<sup>92</sup> A potential

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85. *Id.*

86. *Id.*

87. *Id.* "Several sources" confirmed that the artillery rockets used by the Syrian regime were capable of delivering chemical agents. *Id.* at 5.

88. *Id.*

89. *Id.*

90. *Id.*; Office of the Press Secretary, *supra* note 68.

91. FRANCE DIPLOMATIE, *supra* note 14; Office of the Press Secretary, *supra* note 68.

92. U.N. Indep. Int'l Comm'n Rep., *supra* note 17, at 12. In their report to the General Assembly of the U.N., the Human Rights Council concluded:

The Syrian Arab Republic has acted in breach of the International Covenant on Economic, Social and Cultural Right, the International Covenant on Civil and Political rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child and the Optional Protocol thereto on the involvement of children in armed conflict. . . .

In the course of the conflict, the warring parties in the Syrian Arab Republic have failed to comply with their obligations under international humanitarian law. They have violated the fundamental prohibitions of common article 3 of the Geneva Conventions, which are binding on all parties to the conflict. Such violations amount to war crimes, incurring individual

prosecution of President al-Assad may prove to be problematic for a number of reasons, even if international politics is removed from the equation.<sup>93</sup> First, the list of offenses for which President al-Assad may incur liability is quite expansive. Government forces, under President al-Assad's oversight, have reportedly conducted "widespread attack on civilians, systematically committing murder, torture, rape and enforced disappearances" under a crime against humanity standpoint.<sup>94</sup> Under a war crimes perspective, he may be liable for "murder, hostage-taking, torture, rape and sexual violence, using and recruiting children in hostilities and targeting civilians in sniper attacks."<sup>95</sup> Furthermore, government forces under his purview have also "disregarded the special protection accorded to hospitals, medical and humanitarian personnel and cultural property. Aleppo was subjected to a campaign of barrel bombing . . . [and] [g]overnment forces . . . perpetrated massacres."<sup>96</sup> The Syrian military forces also "used incendiary weapons, causing superfluous injury and unnecessary suffering . . . . Indiscriminate and disproportionate aerial

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criminal responsibility. Individual fighters and their commanders may be held accountable for their acts under international criminal law and by States exercising universal jurisdiction.

U.N. Indep. Int'l Comm'n Rep., *supra* note 17, at 23; see also *UN Implicates Bashar al-Assad in Syria War Crimes*, *supra* note 17 (reporting then U.N. High Commissioner for Human Rights Navi Pillay's official statement that "[t]he UN's commission of inquiry into Syria has produced 'massive evidence . . . [of] very serious crimes, war crimes, crimes against humanity[']").

93. See *Syria Crisis: Russia and China Step Up Warning Over Strike*, BBC NEWS (Aug 27, 2013), <http://www.bbc.com/news/world-us-canda-23845800> [<https://perma.cc/4Q4V-LU7M>] (reporting Russia and China's—both permanent members of the Security Council with veto power—official criticism and opposition to the reactive desire by "Western powers" to intervene in Syria).

94. U.N. Indep. Int'l Comm'n Rep., *supra* note 17, at 1.

95. *Id.*

96. *Id.* Barrel bombs are essentially:

[O]ld oil barrel packed with explosives, shrapnel and maybe some kind of incendiary device . . . . They are literally pushed out of the helicopter and when they land—they detonate on impact—and explode. [They] take down whatever is in their path. . . . The Syrian Air Force is either criminally incompetent, doesn't care whether it kills scores of civilians—or deliberately targets civilian areas.

Matthew Bell, *What are 'Barrel Bombs' and Why is the Syrian Military Using Them?*, PUB. RADIO INT'L (Feb. 4, 2014, 9:00 PM), <http://www.pri.org/stories/2014-02-04/what-are-barrel-bombs-and-why-syrian-military-using-them> [<https://perma.cc/473C-TKAY>]. Given their indiscriminate and wide spread area of effect, they are very likely violative of international law concerning conduct during war, especially in urban areas. See *id.* ("[A]s a weapon of terror, this thing is extremely effective.").

bombardment and shelling caused large-scale arbitrary displacement.”<sup>97</sup> Choosing which crimes to charge President al-Assad under may thus be a difficult decision.<sup>98</sup> Moreover, how each crime is charged—either based on discrete offensive acts or on a campaign of offensive acts—may present problems as well.<sup>99</sup>

Second, attaching liability for these acts may also be problematic due to his position as an executive of state.<sup>100</sup> The attachment of liability conceivably could set dangerous precedent against other state executives.<sup>101</sup> This in turn may undermine the political will—in addition to charging options—of other world leaders to hold President al-Assad accountable for a number of the listed alleged offenses.<sup>102</sup>

Third, given the relative youth of the ICC,<sup>103</sup> its unique nature, and jurisdiction, properly adjudicating criminal charges—especially because it is likely multiple charges will be filed—against President al-Assad may generate far more controversy than regular domestic criminal cases.<sup>104</sup> Prosecuting the case before the ICC will likely require the court’s careful navigation through—or avoidance of—issues of first impression.<sup>105</sup> Additionally, since the ICC relies on a Roman civil law system (as opposed

97. U.N. Indep. Int’l Comm’n Rep., *supra* note 17, at 1.

98. *See id.* (listing the sheer number of “gross violations of human rights” and “war crimes”).

99. *See id.* (“Government forces have committed . . . the war crimes of murder, hostage-taking, torture, rape and sexual violence, recruiting and using children in hostilities and targeting civilians in sniper attacks.”).

100. *See* Brett Edwards & Mattia Cacciatori, *Why Bashar Al-Assad Won’t Face Justice Over Chemical Weapons Any Time Soon*, NEWSWEEK, (Sept. 2, 2016, 7:00 AM), <http://www.newsweek.com/dont-expect-assad-be-held-justice-495251> [<https://perma.cc/3KRG-XVEV?type=image>] (reporting on the difficulty of holding heads of state responsible which now seems “beyond the reach of the ICC”).

101. *See id.* (“To date, not only have investigations against sitting heads of state been inconclusive, they also appear to have contributed to domestic crises in the states they have occurred in.”).

102. *See id.* (referring Libya to the ICC in 2011 caused the collapse of the State and led President Obama to publicly declare it as “the worst mistake of his presidency”). Other world leaders are thus unlikely to put themselves in the same situation with Syria.

103. The International Criminal Court came into existence in 2002 as explained in the next section. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

104. *See* Edwards & Cacciatori, *supra* note 100 (“It has also reignited calls for Syria to be referred to the [ICC]. But, yet again, we have seen Russia, Syria and Iran seeking to prevent or hamstring any process to prosecute the Assad Regime.”).

105. *Closed Stage*, INT’L CRIM. CT., <https://www.icc-cpi.int/Pages/closed.aspx> [<https://perma.cc/AD4Q-XTU8>] [hereinafter ICC – *Closed Stage*] (listing the cases the ICC has prosecuted and closed).

to a common law system),<sup>106</sup> seeking jurisprudential guidance may be problematic in itself. Finally, the risk of judicial odyssey is especially magnified because the ICC has only a handful of cases under its belt.<sup>107</sup>

Here, however, for the sake of reducing the risk of prosecutorial odyssey, this hypothetical prosecution of President al-Assad will focus on trying him for the illegal use of chemical weapons at Ghouta. In this hypothetical prosecution, chargeable crimes listed under the Rome Statute<sup>108</sup> will be examined in conjunction with each other. This paper will also explore how liability may attach under the doctrine of superior liability, among others.<sup>109</sup>

#### A. *The International Criminal Court*

##### 1. Jurisdiction of the ICC

The ICC was established by the Rome Statute of the International Criminal Court ("Rome Statute")<sup>110</sup> and entered into force in 2002.<sup>111</sup> The ICC is situated at The Hague and has subject matter jurisdiction under Article 5 for the crimes of genocide,<sup>112</sup> crimes against humanity,<sup>113</sup> war crimes, and the crime of aggression.<sup>114</sup> The ICC is independent of the U.N., although it maintains a cooperative relationship with the U.N.'s international body.<sup>115</sup>

The ICC's jurisdiction over nation-states, however, is somewhat limited compared to domestic state courts. The Court's jurisdiction first extends to all parties under the Rome Statute.<sup>116</sup> "[T]he Court may exercise its

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106. The International Criminal Court does not rely on stare decisis principles as used by common law systems. Instead it relies on a Roman-Civil Code system. Rome Statute, *supra* note 103. This is further explained in the next section.

107. ICC – *Closed Stage*, *supra* note 105.

108. Rome Statute, *supra* note 103.

109. *See Infra* Part C.

110. Rome Statute, *supra* note 103.

111. *Id.*

112. *Id.* art. 6.

113. *Id.* art. 7.

114. *Id.* art. 8.

115. U.N. General Assembly, *Relationship Agreement Between the United Nations and the International Criminal Court*, art. 2, U.N. Doc. A/58/874 (Aug. 20, 2004), <http://www.refworld.org/pdfid/43f203bb4.pdf> [https://perma.cc/4VLZ-XUM3].

116. Rome Statute, *supra* note 103, art. 12.

jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . .”<sup>117</sup> A non-party nation-state may also accept jurisdiction of the ICC on an ad hoc basis via voluntary declaration.<sup>118</sup> The ICC’s jurisdiction may be further limited based on geography and over a person’s national identity.<sup>119</sup> This is dependent upon whether the territory where the alleged crime occurred belonged to a party of the Statute.<sup>120</sup>

Once these precursors are met, a case can reach the ICC in several ways. A State party<sup>121</sup> or the U.N. Security Council<sup>122</sup> may refer a case to the ICC for the prosecution of international crimes.<sup>123</sup> Alternatively, the prosecutor<sup>124</sup> may also initiate a case *proprio motu*.<sup>125</sup> However, under Article 17 of the Statute, a case is inadmissible before the ICC when a State, also having jurisdiction, has conclusively investigated the case or intends to prosecute the case in its own judicial system.<sup>126</sup> Nevertheless, if such a State is “unwilling or unable to genuinely carry out the

117. *Id.*

118. *Id.* art. 12(3).

119. *Id.* art. 12(2)(a)–(b).

120. *Id.* art. 12(2)(a). Additionally, if the alleged crime occurred on a ship or airplane, “the State [o]f registration” of the vessel will be determinative for jurisdictional purposes. *Id.*

121. “The Court may exercise its jurisdiction . . . i[n]: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; . . . .” *Id.* art. 13(a).

122. “The Court may exercise its jurisdiction . . . i[n]: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; . . . .” *Id.* art. 13(b); *see also* U.N. Charter art. 39–51 (enumerating broad powers to the U.N. Security Council for the purposes of determining the existence of and taking collective action for “threat to the peace, breach of the peace, or act[s] of aggression”).

123. Rome Statute, *supra* note 103, art. 13.

124. *See id.* art. 42(1) (establishing the Office of the Prosecutor as a “separate organ of the Court”).

125. *Id.* art. 15(1).

126. *Id.* art. 17(1). There are some specific circumstances where the court may exercise jurisdiction:

The Court may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes were committed on or after 1 July 2002 and: the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the UN charter.

ICC: *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx> [https://perma.cc/JRT9-YBWX].

investigation or prosecution,” the ICC may determine the case to be admissible before it.<sup>127</sup>

## 2. Establishing the ICC’s Jurisdiction over the Syrian Arab Republic

Establishing jurisdiction of the ICC over President Bashar al-Assad, on first impression, would seem problematic because the Syrian Arab Republic is technically not a party to the Statute.<sup>128</sup> However, a solution to this may lie in the fact that, although it has yet to ratify it, the Syrian Arab Republic was a signatory to the Statute on November 29, 2000.<sup>129</sup> Therefore, the ICC may establish its jurisdiction over Syria under the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>130</sup> Under the Vienna Convention, Syria is obligated “to refrain from acts which would defeat the object and purpose of a treaty when”—as applied here—Syria “has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty . . . .”<sup>131</sup>

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127. Rome Statute, *supra* note 103, art. 17(1)(a). The ICC’s jurisdiction embraces the concept of “complementarity”—complementing that of the States’ in criminal matters. See ICC: *How the Court Works*, *supra* note 126 (“The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not[,] are unwilling or unable to do so genuinely.”).

128. *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [<https://perma.cc/5YQD-CT3F>].

129. Depositary, Status of Treaties, Chapter XVIII, Penal Matters, 10. *Rome Statute of the International Criminal Court*, U.N.T.C. 1 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> [<https://perma.cc/7VLM-XBSL>].

130. Vienna Convention on the Law of Treaties art. 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

131. *Id.* art. 18. Syria ratified the Vienna Conventions on the Law of Treaties on October 2, 1970, with certain reservations—none of them which overtly affect the application of Article 18. Depositary, Status of Treaties, Chapter XXIII, Law of Treaties, 1. *Vienna Convention on the Law of Treaties*, U.N.T.C. 2, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> [<https://perma.cc/Q66M-UDYC>]. Article 18 states:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Several alternate routes may be more easily facilitated<sup>132</sup> via provisions of the Rome Statute itself. Under Article 13(b), the U.N. Security Council has the power to refer alleged criminal acts to the Prosecutor of the ICC.<sup>133</sup> Another alternate route is possible if the Syrian Arab Republic itself declared itself subject to the ICC's jurisdiction on an ad hoc basis.<sup>134</sup> Obviously, this latter situation would only be possible in a future scenario where President al-Assad has been removed from power and a new government has been installed in its place.

In any of the scenarios listed above, it should be no challenge for the potential prosecution of President al-Assad to be admissible as a case before the Court.<sup>135</sup> Under the current regime, it is self-evident that the Syrian domestic courts (under the al-Assad regime) are "unwilling" to genuinely prosecute President al-Assad or any of his senior officials.<sup>136</sup> Syrian courts, if a criminal investigation even happens at all, are more than likely to manipulate the judicial process in order to "shield," cause "undue

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Vienna Convention, *supra* note 131, art. 18.

132. The availability of these alternative routes is based on the assumption that the process will not be undermined by the veto power that U.N. Security Council members possess. See Jeremy Blackman, *Getting to "No" Why Russia Loves the Veto*, PBS (Sept. 26, 2012, 12:10 PM), <http://www.pbs.org/newshour/rundown/un-security-council-getting-to-no-why-russia-loves-the-veto/> [https://perma.cc/TL77-2FMH] ("The Russian-led vetoes are proof of the country's influence, but have also served to neuter the entire international body and caused some to question the point of even having a United Nations.").

133. Rome Statute, *supra* note 103, art. 13(b).

134. *Id.* art. 12(3). Under Article 11, the ICC's jurisdiction is limited (*jurisdiction ratione temporis*) to criminal acts conducted after the date a State becomes party to the Statute. *Id.* art. 11. An exception exists, however, pursuant to Article 12 where jurisdiction is created retroactive to the date of the alleged act if the State declares its acceptance of the jurisdiction of the ICC on an ad hoc basis. *Id.* art. 11, 12(3).

135. *Id.* art. 17.

136. Under Article 17, the ICC is excepted from the ICC principle of complementarity if the "State is unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* art. 17(1)(a). In these situations, the Court may evaluate the admissibility of the case:

In order to determine unwillingness in a particular case, the Court shall consider[] . . . whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken . . . for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . .
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially . . .

*Id.* art. 17(2)(a)–(c).

delay,” or otherwise remain far from being impartial.<sup>137</sup> Additionally, even in the regime change scenario, there is a high probability that the Syrian judicial system would be unable to adequately prosecute these individuals due to a substantial collapse during the regime change itself.<sup>138</sup> Therefore, the ICC would be the most appropriate forum to prosecute President al-Assad under the majority of permutations of either basic scenario.<sup>139</sup>

### B. *The ICC's Use of Precedent and Legal Principles*

As referenced above, the ICC is organized under a Roman civil law system of jurisprudence.<sup>140</sup> Under such a system, precedent is viewed and

137. *Id.*

138. *Id.* art. 17(3). *But see Saddam Hussein Trial Fast Facts*, CNN (Mar. 12, 2016), <http://www.cnn.com/2013/10/30/world/meast/saddam-hussein-trial-fast-facts/> [<https://perma.cc/DUM4-K5W5>] (detailing the timeline of events in the domestic prosecution of Saddam Hussein for genocide, crimes against humanity, and war crimes in the wake of being removed from power).

139. *See Q&A: Syria and the International Criminal Court*, HUMAN RIGHTS WATCH (Sept. 17, 2013, 2:00 AM), <https://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court#14> [<https://perma.cc/SJ6K-SS66>] (exploring the need, methods, and possible implications of prosecuting war crimes and crimes against humanity committed in Syria but discussing the possibility of prosecution by other national criminal courts under the doctrine of “universal jurisdiction”).

140. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT, no. 1, 2011, at 5, 12–14 (2011) (“Turning now to international jurisdictions, . . . The courts have in fact no obligation to comply with precedent . . . [w]e see that all the international jurisdictions distance themselves in principle from the rule of *stare decisis*.”). Under Article 21 titled “Applicable law” of the Rome Statute:

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

Rome Statute, *supra* note 103 art. 21.



utilized under *jurisprudence constante* doctrines.<sup>141</sup> The baseline principle for Roman civil law systems is the idea that “[t]he role of the courts is to solve disputes that are brought before them, not to make laws or regulations.”<sup>142</sup> Therefore, only statutes or other enacted legislation—in the case of the ICC, the Rome Statute and other similar conventions—qualify as primary sources of law.<sup>143</sup> These laws are formulated—albeit imperfectly—to be complete, thereby leaving little to no discretion to the courts.<sup>144</sup> However, similar to the common law *stare decisis* system, the use of prior case law plays an important role in assuring more “certainty and completeness in the law.”<sup>145</sup> The divergence between the two

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141. Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT’L REV. L & ECON. 519, 522 (2006).

142. *Id.*

143. *Id.*

A sequential and orderly method (*méthode*) of interpretation is therefore necessary. As the history of the law reveals, the existence and application of a uniform method is the best way to achieve consistency predictability and fairness of outcomes. Thus the following points are proposed to further achieve this consistency: 1) The Statute controls; 2) the *Elements* and the *Rules* are to serve as guidelines for the Court’s interpretation of the Statute but are not binding; 3) where an inconsistency or a gap exists in the Statute, the *Elements* and the *Rules*, the Court is to resort to the sources of international law contained, in a hierarchal order, in Article 38 of the ICJ’s Statute, namely treaties, customary international law, general principles of law, and the writings of the most distinguished publicists (doctrine); 4) in respect to all other issues, the sources of international law as listed in Article 38 of the ICJ Statute and as interpreted by the ICJ, should be applied; and 5) the Court must rely on the Vienna Convention on the Law of Treaties, and its customary law evolution to interpret the treaty’s provisions.

1 M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 165 (Transnational Publishers 2005) [hereinafter Bassiouni – LEGISLATIVE HISTORY].

144. Fon & Parisi, *supra* note 142, at 22.

145. *Id.* Although the ICC relies on the Roman civil law system, it has adopted some common law attributes as a result of being an international melting pot of numerous national criminal jurisprudence. Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT’L L & COM. REG. 407, 434–36 (2001). The Prosecutor of the ICC and the Court itself have broad discretion under the Rome Statute unlike most other Roman civil law courts. *Id.* “Many unique facets of international tribunals stem from attempts to blend the two predominant western juridical traditions, civil law and common law.” *Id.* “[T]he ICC is not strictly bound to peremptory rules of procedural law and can adopt evaluations tending to verify whether the immediate proceedings constitute a violation of the right to a fair trial.” *Id.*

In other words, the control given to the judge [unlike typical Roman civil law systems] is used exclusively to ascertain whether the act was done in conformity with the form provided for by law. If a violation occurred, the civil law system does not provide for the judge to inquire as to whether actual prejudice resulted.

systems begins where case law, under the common law system's stare decisis doctrine, is allowed in some circumstances to have binding authority.<sup>146</sup> The Roman civil law system, on the other hand, does not obligate courts to adhere to prior case law as a per se binding authority.<sup>147</sup> Instead, under *jurisprudence constante*, a body of case law that meets a sufficient threshold of uniformity and consistency is, at a maximum, persuasive, but with "considerable authoritative force."<sup>148</sup>

In the case of the ICC, however, there are very few cases tried by the Court from which to draw case law at all.<sup>149</sup> Because of its relative youth, only five cases tried by the ICC have reached closed status.<sup>150</sup> Of these

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*Id.*

146. Fon & Parisi, *supra* note 142, at 522.

147. *Id.* at 524 ("Under *jurisprudence constante* doctrines[,] a judge is not bound by a single decision in a single previous instance. Authoritative force stems from a consolidated trend of decisions on a certain point.").

148. The doctrine of *jurisprudence constant* explains how courts should treat prior cases:

This path of legal development gave rise to *jurisprudence constante*, the doctrine under which a court is required to take past decisions into account only if there is sufficient uniformity in previous case law. No single decision binds a court and no relevance is given to split case law. Once uniform case law develops, courts treat precedents as a persuasive source of law, taking them into account when reaching a decision. The higher the level of uniformity in past precedents, the greater is the persuasive force of case law.

*Id.* at 522. However, Roman civil law courts are continuously adherent to the idea that "legislation, the solemn expression of the legislative will, is the superior source of law." Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n, 903 So. 2d 1071, 1087 (La. 2005). "*Jurisprudence constante* carries 'considerable persuasive authority,' but is not the law." *Id.* at 1088.

There are three paths to establishing this persuasive yet authoritative force: dominant positive jurisprudence, dominant negative jurisprudence, and split case law. Fon & Parisi, *supra* note 142, at 525. Dominant positive jurisprudence occurs when a "sufficiently large percentage of cases" accept or approve a cause of action. *Id.* Dominant negative jurisprudence, on the other hand, exists when a "sufficiently large number of cases" negates a claim. *Id.* Split case law, moreover, happens when the case law has an insufficient consensus of decisions in either direction. *Id.* In such a situation, these decisions are awarded little authoritative weight. *Id.*

Furthermore, when a judgment is made in opposition to dominant jurisprudence, it will usually be reversed on appeal. *Id.* It can still, however, be valuable in developing countervailing case law by beginning or enlarging an existing trend of dissent in the judiciary. *Id.*

149. ICC – *Closed Stage*, *supra* note 105.

150. "Cases may be closed once a conviction/sentence or an acquittal becomes final [usually after appellate review], although a case involving a conviction/sentence [i.e. not an acquittal] may be reopened for revision..." *Id.* As of October 18, 2016, the ICC has ten cases undergoing preliminary examinations, ten "situations" under investigation, zero cases in the pre-trial phase, five

five cases, two did not have their charges confirmed, one was withdrawn, one was vacated, and one was acquitted.<sup>151</sup> However, the ICC, while not bound by them, may draw from past ad hoc international criminal tribunals.<sup>152</sup> Of particular relevance to the ICC are the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>153</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>154</sup> Formed by the U.N. under the provisions of Article 41 of the U.N. Charter,<sup>155</sup> both ad hoc tribunals served as successful temporary models for the more permanent ICC.<sup>156</sup> A comparison of the three tribunals reveals similarities in the founding instruments, the structure (organs of the courts), the crimes falling within the courts' jurisdictions, and procedure.<sup>157</sup> The ICC, although young in its formation, may thereby rely on case law developed by the sixty-two convictions (out of ninety-three indictments) of the ICTR<sup>158</sup> and the 154 completed trials (out of 161 indictments) of the ICTY.<sup>159</sup>

The ICC also may incorporate case law and other jurisprudence from national domestic courts to supplement its own, but the court's self-allowance to do so is tempered by a high level of prudence.<sup>160</sup> This tempered ability originates in part from the ICC's close ancestral roots to

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cases in trial, one case undergoing appellate review, three cases holding reparation proceedings post-conviction, and five cases that are closed. *Id.*

151. *Investigations and Cases*, INT'L CRIM. CT., <https://www.icc-cpi.int/> [<https://perma.cc/AD4Q-XTU8>].

152. See U.N. *Documentation: International Law*, U.N. DAG HAMMARSKJOLD LIBR., <http://research.un.org/en/docs/law/courts> [<https://perma.cc/R9CY-SNHP>] (listing other international tribunals with past relationships to the U.N.).

153. ICTY, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> [<https://perma.cc/7AKP-87GN>].

154. *Id.*

155. U.N. Charter art. 41; Caianiello & Illuminati, *supra* note 145, at 420–22.

156. Caianiello & Illuminati, *supra* note 145, at 433–34.

157. *Id.*

158. *The ICTR in Brief*, U.N. MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> [<https://perma.cc/C39A-LAB4>].

159. U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, *supra* note 153. The ICC can also utilize case law from other international jurisdictions such as the International Court of Justice. Guillaume, *supra* note 141, at 20. However, it is not bound to them. Guillaume, *supra* note 140, at 5, 20.

160. See Caianiello & Illuminati, *supra* note 145, at 409–10 (describing how international tribunals serve as a “laboratory where different cultures and procedural methods are merged” as part of the ongoing evolution of international law); Guillaume, *supra* note 140, at 20 (indicating the Court has remained judicially prudent in looking outside of its own case law to supplement its decisions).

its ad hoc international criminal tribunal predecessors.<sup>161</sup> Although the ICTR and the ICTY were also based on the Roman civil law system,<sup>162</sup> national domestic law was used to supplement and fill in gaps that their respective statutes left unexplored.<sup>163</sup> One very notable example is the ICTY's use of the U.S. Supreme Court's *Blockburger* test<sup>164</sup> in *Prosecutor v. Delalic* (also officially known as the "*Čelebići Case*").<sup>165</sup> The appeals chamber of the ICTY, faced with alleged error for cumulative convictions under both war crimes and crimes against humanity based on the same act, looked to the domestic laws of Zambia, Germany, and the United

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161. See Caianiello & Illuminati, *supra* note 145, at 422–23 (explaining the evolution of the international criminal justice system from the ICTY and ICTR to the ICC and the amount of continuity between each of the courts).

162. "The precedents of ad hoc tribunals are constantly invoked before the International Criminal Court, but the Court has adopted a prudent attitude." Guillaume, *supra* note 140, at 20.

163. See Use of Domestic Law Principles for the Dev. of Int'l Law Study Group, Int'l Law Ass'n, *Report—Johannesburg Conference 2016*, at 10–11, (2016), <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1616&StorageFileGuid=54c25d0d-3d18-49c4-8d73-b1bec1a346aa> [https://perma.cc/WP3W-GXN9] ("[I]nternational criminal courts and tribunals have not only applied general principles as gap-fillers of the law but also as value-oriented principles to interpret international rules . . ."). The ad hoc international criminal tribunals often cited to "general principles" recognized by "civiliz[ed] nations" as a means of incorporating national domestic law to supplement its own. *Id.* The majority of the time, however, the domestic national jurisprudence incorporated under a "horizontal move" has originated from seven jurisdictions: United States, Britain, Germany, Canada, Italy, France, and Belgium. *Id.* Compared to earlier years, nevertheless, courts of international jurisdiction have become increasingly "more geographically representative and the comparative research more varied." *Id.* at 11; see also *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 5, 6, 32–91 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (concluding duress was a mitigating factor for sentencing and not a complete defense to the charge of crimes against humanity after comparing the domestic law of thirty nations to find a general principle of law to fill the gap in international law).

164. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911))).

165. *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶¶ 401–12 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) [hereinafter *Čelebići Case*]. *Prosecutor v. Delalic* was not the first time (nor only time) that the ICTY adopted the *Blockburger* test as a means to prevent double jeopardy or *ne bis in idem*. *Čelebići Case*, *supra*, ¶¶ 393–96. It was also used in *Prosecutor v. Kupreškić* in the ICTY trial chamber. *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶¶ 678–700 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) [hereinafter *Kupreškić*, Trial Judgment]. However, the *Čelebići* appeals chamber's recognition of the *Blockburger* test preceded that of *Kupreškić*. See *Kupreškić*, Trial Judgment, *supra*, ¶ 387 n.618 (referencing the *Čelebići Case*'s use of the *Blockburger* test on appeal).

States.<sup>166</sup> The tribunal also examined the jurisprudence principle utilized by a post-World War II U.S. military tribunal.<sup>167</sup> The appeals chamber concluded that for “reasons of fairness” and because “only distinct crimes may justify multiple convictions,” the *Blockburger* test was to be used as the evaluating standard for multiple convictions based on the same act.<sup>168</sup>

#### V. POSSIBLE CHARGES AGAINST PRESIDENT AL-ASSAD UNDER THE ROME STATUTE

As referenced earlier, President al-Assad has been accused of a litany of war crimes and crimes against humanity—two of the four offense categories within the jurisdiction of the ICC.<sup>169</sup> However, what these might specifically look like, as pertaining to the Ghouta attacks, has not been explored or, at the very least, not publicly detailed.<sup>170</sup> Although the public at large is not privy to what might be crucial information, it is still possible to extrapolate a series of potential charges from the facts publically known about the events at Ghouta.

Under the Rome Statute and the facts presented above, numerous portions of Article 7 and Article 8 would be invoked. However, Article 8 offers two subsets of offenses that are generally distinct from each other.<sup>171</sup> Furthermore, all offenses under Article 8, including these two subsets, are further elaborated and expanded in *Elements of Crimes*, adopted by the ICC under Article 9 although only as a non-binding—though highly

166. Čelebići Case, *supra* note 165, ¶¶ 401–09.

167. *Id.* ¶¶ 410–11.

168. *Id.* ¶¶ 412. The ICTY also faced a related allegation of error—based on cumulative charging of the same act—on appeal from the trial chamber. *Id.* ¶ 400. The appeals chamber held that cumulative charging is allowed for a variety of reasons, which includes the lack of certainty over which charges will result in conviction. *Id.* ¶ 400.

169. See *UN Implicates Bashar al-Assad in Syria War Crimes*, *supra* note 17 (citing U.N. Human Rights Chief, Navi Pillay, for the proposition that “[t]he UN’s commission of inquiry into Syria has produced ‘massive evidence . . . [of] very serious crimes, war crimes, crimes against humanity . . .’”); see also U.N. Indep. Int’l Comm’n Rep., *supra* note 17 (detailing numerous repeated violations of international law including the use of prohibited chemical weapons, war conduct disregarding international conventions regarding non-combatants, indiscriminate targeting during military operations, and unlawful killings). Under Article 5 of the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute, *supra* note 103, art 5, 6–8.

170. See *UN Implicates Bashar al-Assad in Syria War Crimes*, *supra* note 17 (indicating names and specific evidence were not publically released due to potential ICC prosecution).

171. Compare Rome Statute, *supra* note 103, art. 8(2)(b)(i)–(xxvi) (listing general war crime provisions requiring an international armed conflict nexus), with *id.* art. 8(2)(c)–(f) (listing general war crime offenses requiring an armed conflict nexus “not of an international character”).

persuasive—assistive tool of interpretation.<sup>172</sup> While many of the offenses in each subset, with some exceptions, run parallel to offenses in the other, determining which subset is to be utilized can depend on the classification of the conflict at the time of the Ghouta attacks.<sup>173</sup> For the scenario's purposes here, though still debatable, it will be assumed that the armed conflict in Syria was not of an international nature at the time.<sup>174</sup> Evidentiary standards will also be overlooked since the full range of evidence and its credibility, at this point in time, has been kept confidential. Therefore, we will assume, for the time being, that the evidence sufficiently links the perpetrator (al-Assad) to the conduct.

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172. Under Article 9 of the Rome Statute:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by two-thirds majority of the members of the Assembly of State Parties.

...

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

*Id.* art. 9. *Elements of Crimes*, in cases where the Rome Statute's provisions list multiple offenses in a single provision, separates out each offense and provides the necessary elements for each offense. Int'l Crim. Ct., *Elements of Crimes*, art. 6–8 (2011) [hereinafter *Elements of Crimes*]. Utilizing the same organizational structure as the Rome Statute, *Elements of Crimes* lists out forty-six offenses pertaining to international armed conflicts and twenty-one offenses “not of an international character.” *Id.* art. 8(2)(a)–(e). The eleven offenses expanding the provisions of Article 8(2)(a), moreover, deal with “[g]rave breaches of the Geneva Conventions of 12 August 1949 . . .” *Id.* art. 8(2)(a).

Although the *Elements of Crimes* is intended to be merely an assistive tool of interpretation, it is a highly persuasive authority for the ICC. Rome Statute, *supra* note 103, art. 9. Under the “general law provision” of Article 21, the Rome Statute lists *Elements of Crimes* immediately subsequent to the Rome Statute itself as a primary source of authority. *Id.* art. 21; *see also* Bassiouni – LEGISLATIVE HISTORY, *supra* note 143, at 162–63 (discussing the interplay of Article 21 and Article 9 in the Rome Statute with regard to *Elements of Crimes*). Refer also to *supra* note 136 discussing a proposed methodical order for interpretation of different authorities.

173. Compare *Elements of Crimes*, *supra* note 172, art. 8(2)(a)–(b) (requiring an international armed conflict nexus for specific war crime offenses), with *id.* art. 8(2)(c)–(e) (recognizing specific war crime offenses where an armed conflict nexus was “not of an international character”).

174. See *Syria in Civil War, Red Cross Says*, BBC NEWS (July 15, 2012), <http://www.bbc.com/news/world-middle-east-188496362> [<https://perma.cc/M94E-4JK8.1>] (reporting the International Committee of the Red Cross's official determination that the Syrian conflict was a “non-international armed conflict”—or civil war—by July 2012, roughly a year prior to the Ghouta attacks). Syrian regime forces were largely focusing on combating internal elements as opposed to foreign armed forces. Nevertheless, it is arguable that the conflict was of an “international character” at the time given the involvement of a number of foreign powers funding various factions of the conflict. *Id.*

Furthermore, to keep things simple, it will be assumed that the Ghouta attacks were a single continuous action even though they could constitute discrete attacks on multiple locations.<sup>175</sup> Under this “armed conflict not of an international character”<sup>176</sup> classification and other assumptions, the potential charges in an indictment against al-Assad could include:

The crime against humanity of murder;<sup>177</sup>  
 The crime against humanity of extermination;<sup>178</sup>  
 The crime against humanity of other inhumane acts;<sup>179</sup>  
 The war crime of attacking civilians;<sup>180</sup>  
 The war crime of employing poison or poisoned weapons;<sup>181</sup> and  
 The war crime of employing prohibited gases, liquids, materials or devices.<sup>182</sup>

It is more than likely that the defense will object to many of these charges for violating double jeopardy (*ne bis in idem*) principles.<sup>183</sup> Under

175. “A distinction is laid down in adjudged cases and in text-writers between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed *uno ictu*.” Blockburger v. United States, 284 U.S. 299, 302 (1932) (quoting *Ex parte Snow*, 120 U.S. 274, 286 (1887)).

176. *Elements of Crimes*, *supra* note 172, art. 8(2)(c)–(e).

177. *Id.* art. 7(1)(a). The charge of murder as a war crime offense could also be charged. *Id.* art. 8(2)(c)(i). Furthermore, given the initial-appearing similarity between the crime against humanity of murder and the war crime offense of murder, it may be prudent to include the latter as an alternative offense, regardless of whether it is charged or not.

178. *Id.* art. 7(1)(b).

179. *Id.* art. 7(1)(k).

180. *Id.* art. 8(2)(c)(i).

181. *Id.* art. 8(2)(e)(xiii).

182. *Id.* art. 8(2)(e)(xiv).

183. Double jeopardy, referred to as *ne bis in idem* in international law, is statutorily provided for in Article 20 of the Rome Statute:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
  - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

the *Čelebići Case*, however, cumulative charging of offenses for the same acts is “generally permissible.”<sup>184</sup> The rationale is that “it is not possible to determine to a certainty which of the charges brought against an accused will be proven.”<sup>185</sup> Cumulative charges, therefore, enable the trial chamber to be “better poised, after the parties’ presentation of evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.”<sup>186</sup> Furthermore, under the *jurisprudence constante* of the Court, the practice of cumulative charging based on the same nucleus of facts seems to be well-established precedent under international law.<sup>187</sup>

Provided the ICC accepts the charges in this hypothetical indictment, there is sufficient evidence to fulfill the elements of most—if not all—of the charges. Nevertheless, some of the charges could be found to have less plausible substance than others. This would largely depend on how the ICC would construct the statutory language in these elements. The possible directions on the interpretation of each element warrants examination in order to determine its probability of success in surviving as a potential charge.

#### A. *The Crime Against Humanity of Murder*

The crime against humanity of murder is applicable when: (1) “[t]he perpetrator killed one or more persons;” (2) “[t]he conduct was committed as a part of a widespread system or systematic attack directed against a

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- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Rome Statute, *supra* note 103, art. 20. However, since the statutory language is very broad, as mentioned above, the Blockburger test has been adopted as a supplemental tool for procedural purposes. See *Čelebići Case*, *supra* note 165, ¶ 412 (finding “only distinct crimes may justify multiple convictions” under the *Blockburger* test).

184. See Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶¶ 384–86 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (citing *Čelebići Case*, *supra* note 165, ¶ 400) [hereinafter Kupreškić, Appeals Judgment] (validating the notion that cumulative charging of the same offenses is generally allowable).

185. *Čelebići Case*, *supra* note 165, ¶ 400.

186. *Id.*

187. See *id.* (“In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.”).



civilian population;" and (3) "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."<sup>188</sup> In the facts presented above, it is clear that the attacks were both "widespread" geographically and "systematic" in their coordinated nature as a military operation.<sup>189</sup> Although the Prosecution will only have to prove one or the other, both can easily be proven here.<sup>190</sup> Knowledge and intent could easily be inferred from the regime-leadership's familiarity with the target area and the regime's efforts to eliminate the evidence.<sup>191</sup> Furthermore, the large death toll for civilians in an urban area where a substantial number of civilians were present more than satisfies the first and third elements.<sup>192</sup>

The prosecutor, nevertheless, may encounter some resistance by the defense on the issue of whether the attacks were "directed against a civilian population."<sup>193</sup> The defense is likely to assert that the primary

188. *Elements of Crimes*, *supra* note 172, art. 7(1)(a).

189. *Id.*

190. See *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) [hereinafter *Kordić*, Appeal Judgment] ("[T]he phrase 'widespread' refers to the large-scale nature of the attack and the number of targeted persons, while the phrase 'systematic' refers to the organised nature of the acts of violence.").

191. See Office of the Press Secretary, *supra* note 68 (reporting on the sustained conventional artillery barrages as an effort to destroy evidence, and the U.S. interception of Syrian regime communications which expressed concern about being caught with the use of chemical weapons).

192. See *Syria Chemical Attack: What We Know*, *supra* note 3 (concluding the death toll total ranged from 200 people to 1,300).

193. *Elements of Crimes*, *supra* note 172, art. 7(1)(a). International courts have also weighed in on what must be shown regarding the attack's target:

It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population', rather than against a limited and randomly selected number of individuals.

*Kordić*, Appeal Judgment, *supra* note 190, ¶ 95 (quoting *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1-A, Appeal Judgment, ¶ 90). Alternatively, the defense may argue that prior indiscriminate attacks on civilian populations by anti-regime forces justifies any alleged indiscriminate attacks by the regime based on the *tu quoque* principle of reciprocal obligations—the failure of one to observe one's obligations allows reciprocation in kind. See Alex Thomson, *Syria Chemical Weapons: Finger Pointed at Jihadists*, TELEGRAPH (Mar. 23, 2013 12:18 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9950036/syria-chemical-weapons-finger-pointed-at-jihadists.html> [https://perma.cc/PHN6-YM64] (reporting on the Syrian regime's accusation of a potential chemical weapons attack at Khan al-Assal by an anti-government jihadist group). However, international case law has amply rejected the *tu quoque* justification as a legal defense (or an affirmative defense) for criminal acts. See Kupreškić, Trial Judgment, *supra* note 165, ¶¶ 515–16 (citing 12 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS: THE GERMAN HIGH COMMAND TRIAL

targets of the attacks were not civilians, but rather the anti-regime forces positioned in the area.<sup>194</sup> Al-Assad could assert that civilian victims were only secondary victims. Therefore, under this contention, even if civilian casualties were a secondary goal, the attacks would not be “directed against a civilian population.”

The answer to this question, however, would depend on the court’s determination of whether “the status of the victim as a civilian and the scale on which [the act] is committed or the level of organization involved characterize a crime against humanity.”<sup>195</sup> “In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.”<sup>196</sup> The likely factors that the ICC will rely on include: (1) “the means and method” of the attack; (2) “the status of the victims;” (3) the number of victims; (4) “the discriminatory nature of the attack;” (5) “the nature of the crimes committed in its course;” (6) “the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.”<sup>197</sup>

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64 (1949), (the defense of *tu quoque* was raised in trials subsequent to the Second World War and was universally rejected). “[T]he *tu quoque* argument . . . envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity.” Kupreškić, Trial Judgment, *supra* note 165, ¶ 517; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflict (Protocol I) art. 51, *adopted* June 8, 1977, 1125 U.N.T.S. 3, (entered into force Dec. 7, 1978) [hereinafter Protocol I] (categorizing attacks on civilians “by way of reprisals” as *absolutely* prohibited). “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, . . .” Protocol I, *supra*, art. 51(7).

194. *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 103 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) [hereinafter Blaškić Case, Appeal Judgment] (outlining the defense’s argument that the attack’s primary objective was not civilians—since it was not the subjective intent—even though civilians were inevitably killed).

195. *Id.* ¶ 107.

196. Kupreškić, Trial Judgment, *supra* note 165, ¶ 524.

197. Blaškić Case, Appeal Judgment, *supra* note 194, ¶ 106 (quoting Prosecutor v. Kunarac, Case No. IT-96-23 & 23/1-A, Appeal Judgment, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002)); *see also* Prosecutor v. Martić, Case No. IT-95-11-A, Appeal Judgment, ¶ 246–61 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 2008) [hereinafter Martić Case] (finding Martić guilty of war crimes and crimes against humanity for an artillery attack utilizing indiscriminate M-87 Orkan rockets dispersing bomblets “directed against a civilian population”).

Here, regime forces conducted the attacks using weapons known to be inaccurate and cause widespread damage over a large area.<sup>198</sup> Furthermore, the timing of the attacks in relation to the weather conditions strongly implies that the attacks were calculated to not only be indiscriminate, but also to maximize the death toll of all inhabitants of the area—including civilians hiding in bunkers.<sup>199</sup> The added effect of utilizing sarin gas—a prohibited chemical weapon—reinforces any notion that regime forces exercised any discrimination in the specific aiming at valid military targets. The attacks, therefore, will most likely be found by the court to have been “directed against a civilian population.”<sup>200</sup> Since this would satisfy the second element, that the conduct was an “attack directed against a civilian population,” the prosecution would likely have a strong case for conviction for the crime against humanity of murder.<sup>201</sup>

#### B. *The Crime Against Humanity of Extermination*

The crime against humanity of extermination shares several elements of its intra-article counterpart of the offense of murder detailed above.<sup>202</sup>

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198. U.N. Mission Report – Ghouta, *supra* note 7, at 21, 23; HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 5, 7–9 (discussing the intentional design of the unguided rockets used at Ghouta to be inaccurate, indiscriminate in inflicting widespread damage, and specially designed for potential chemical weapon payloads). Under Protocol I:

Indiscriminate attacks are prohibited. Indiscriminate acts are: (a) [t]hose which are not directed at a specific military objective; (b) [t]hose which employ a method or means of combat which cannot be directed at a specific military objective; or (c) [t]hose which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Protocol I, *supra* note 193, art. 41(4).

199. U.N. Mission Report – Ghouta, *supra* note 7, at 7.

200. By comparison, the facts here far exceed the magnitude of very analogous facts that led to the ICTY's guilty verdict in *Martić*. *Martić Case*, *supra* note 197, ¶ 246–61. Therefore, it would be very improbable that the ICC would deviate from the suggested conclusion.

201. *Elements of Crimes*, *supra* note 172, art. 7(1)(a).

202. The elements for the extermination offense under Article 7 are:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of a part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The divergence from the “murder” offense, however, lies in the first two elements.<sup>203</sup> This will require the prosecutor, in addition to the elements of “murder,” to show that the regime forces created deadly “conditions of life calculated” to be a part of a “mass killing” of the civilian population in the Ghouta region.<sup>204</sup> The focus of the offense of extermination is the “massiveness” or “scale” of conduct (or patterns of conduct) to bring about the death of the targeted group.<sup>205</sup> Here, the prosecutor may simply point to the regime’s dispersal of poisonous gases at Ghouta as the use of weapons of mass destruction.<sup>206</sup> Additionally, the prosecutor could also point out that the Ghouta attacks were but one instance of a prior pattern of use against politically dissenting civilian populations.<sup>207</sup> Using this dual-prong approach, the court could find enough evidence to support the “massiveness” focus of the conduct for the offense of extermination.

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4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

*Id.* art. 7(1) (b). The third and fourth elements are universal to all of the offenses listed in Article 7 as crimes against humanity. *Id.* art. 7.

203. *Id.* art. 7(1)(b).

204. *Id.*

205. *See* Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, ¶ 516 (Int’l Crim. Trib. Rwanda Dec. 13, 2004) (“Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder[.]’ . . . [t]he expressions ‘on a large scale’ or ‘large number’ do not, however, suggest a numerical minimum.” (internal citations omitted)). “As a crime against humanity, for the purposes of the ICTR Statute, the act of killing must occur within the context of a widespread or systematic attack against the civilian population for national, political, ethnic, racial or religious grounds.” *Id.* Here, in addition to the use of chemical weapons, the attacks were timed to strike right after the morning Muslim prayer, where civilians were congregated and more exposed. HRW – ANALYSIS ON GHOUTA, *supra* note 26, at 4.

206. *See* *Chemical Weapons*, U.N. OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/wmd/chemical/> [<https://perma.cc/M5JC-RPH2>] [hereinafter *Chemical Weapons*, UNODA] (listing chemical weapons as one of the three recognized categories of weapons of mass destruction).

207. *See* U.N. Mission – Final Report, *supra* note 9, at 10–21 (summarizing the results of its investigations on seven of sixteen allegations of the regime’s chemical weapons use by the time of the Ghouta attacks).

### C. *The Crime Against Humanity of Other Inhumane Acts*

"Other inhumane acts" could be offered as a catch-all charge to the other intra-article offense charged.<sup>208</sup> The prosecutor could also offer it as an alternative charge in light of double jeopardy concerns.<sup>209</sup> However, the prosecution could have the most success in using the offense as a means of trying the regime leadership for the more amorphous crime of "inflicting terror."<sup>210</sup>

The differing elements of inhumane acts from the above offenses are: (1) "[t]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health by means of an inhumane act;" (2) "[s]uch act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute;" and (3) "[t]he perpetrator was aware of the factual circumstances that established the character of the act."<sup>211</sup> The offense itself, as noted in case law, was "deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create

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208. *Elements of Crimes*, *supra* note 172, art. 7(1)(k).

209. See *infra* Part D.

210. See Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13-(2), *adopted* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II] (prohibiting acts that cause the "spread of terror among the civilian population"). In this instance, "terrorist attack" would refer to the regime's purposeful selection of the methods-and-means of attack and the selection of targets as a tactic in dispersing a message of fear amongst the civilian population as well as active participants in anti-regime forces. See Peter Knoope, *About Fear, Terrorism and What is Really New*, INT'L CTR. FOR COUNTER-TERRORISM—THE HAGUE (Nov. 4, 2014), <http://icct.nl/publication/about-fear-terrorism-and-what-is-really-new/> [<https://perma.cc/PM4H-DC8K>] ("The impact of a terrorist attack transcends beyond its immediate action in terms of time, geographic space and direct victims . . . [I]terrorist acts are a form of communication."); G.A. Res. 52/164, annex, International Convention for the Suppression of Terrorist Bombings art. 19(2) (Jan. 9, 1998) ("Noting further that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread."). However, in this case it could be applied given the involvement of Branch 450 of the Syrian Scientific Studies and Research Centre. Office of the Press Secretary, *supra* note 68. The Syrian Scientific Studies and Research Centre claims to be a purely civilian agency. Press Release, U.S. Dep't of the Treasury, Three Entities Targeted for Supporting Syria's WMD Proliferation (Jan. 4, 2007), <http://www.treasury.gov/press-center/pressreleases/Pages/hp216.aspx> [<https://perma.cc/9EXE-W3KN>]. However, its allegedly civilian personnel were heavily involved in the preparation of the chemical weapons for use at Ghouta. Office of the Press Secretary, *supra* note 68. Theoretically, this could estop the regime from claiming that the attacks were completed by their armed forces and therefore outside the treaty's technical definition for terrorism.

211. *Elements of Crimes*, *supra* note 172, art. 7(1)(k).

opportunity for evasion of the letter of the prohibition.”<sup>212</sup> Moreover, the crime itself must be of “gravity comparable” to other, more explicitly listed, offenses in Article 7 and effectively constitute a “serious attack upon human dignity.”<sup>213</sup> This, however, could potentially trigger a *nullum crimen* defense, because this offense is not explicitly defined.<sup>214</sup>

Here, the prosecutor could submit to the court that the nature of the Ghouta chemical attacks, in addition to causing death and destruction, were intended to instill a message of terror among the civilian population in violation of customary international law.<sup>215</sup> International case law (as incorporated into customary international law) has declared the components of the crime of terror to include:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.<sup>216</sup>

The indiscriminate nature of the weapons used and of the locations attacked would more than satisfy the *actus reus* component of the crime of terror.<sup>217</sup> Whether the acts or threats actually inflict terror amongst the

212. Kordić, Appeal Judgment, *supra* note 190, ¶ 117 (citing Kupreškić, Trial Judgment, *supra* note 165, ¶ 563).

213. *Elements of Crimes*, *supra* note 172, art. 7; *see also* Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, ¶ 152–54 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (labeling inhumane acts such as “serious attacks upon the human dignity of the victim” as crimes against humanity).

214. *See* Kordić, Appeal Judgment, *supra* note 190, ¶ 94 (noting “*nullum crimen sine lege*” refers to the principle that there is no crime possible unless there is a law prohibiting the specified conduct giving “fair notice” to the prospective defendant).

215. *See* Protocol II, *supra* note 210, art. 13(2) (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

216. Prosecutor v. Galić, Case No. IT-98-29-A, Appeal Judgment, ¶ 100 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006).

217. *See id.* ¶ 102 (“[T]he acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include

civilian population would not be necessary to uphold a conviction.<sup>218</sup> Under the *mens rea* component, however, the prosecution would have to offer evidence of the “specific intent to spread terror” as an underlying intent (“primary purpose”) of the chemical attacks.<sup>219</sup> This would only require that one “primary purpose” of the attack was used to spread terror although other purposes might exist.<sup>220</sup> As stated in the *Galić* appeal opinion:

The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge provided that the intent to spread terror . . . was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.<sup>221</sup>

In terms of making the needed inference of intent, the facts of the case here show the inference to be “irresistible.”<sup>222</sup> The regime deliberately utilized chemical weapons, a weapon of mass destruction, and indiscriminately targeted multiple areas that were home to a large number of civilians.<sup>223</sup> Additionally, the attacks were made in a manner in which the potency of the weapons would be maximized in bringing about death and serious injury to its victims.<sup>224</sup> Among the dead were large numbers

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indiscriminate or [disproportionate] attacks or threats thereof. . . . [T]he crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population” is reflected in “a case of ‘extensive trauma and psychological damage’ being caused by ‘attacks [which] were designed to keep the inhabitants in a constant state of terror.’”).

218. *Id.* ¶ 104.

219. *Id.*

220. *Id.*

221. *Id.*

222. In *Galić*, the trial chamber and the appeals chamber agreed that there was:

“[A]n *irresistible inference* to be drawn from the evidence on the Trial Record that what the Trial Chamber has found to be widespread and notorious attacks against the civilian population of Sarajevo could not have occurred without it being the will of the commander of those forces which perpetrated it . . . [and thus] was deliberate.”

*Id.* ¶ 108 (emphasis added).

223. *Syria Chemical Attack: What We Know*, *supra* note 3.

224. See U.N. Mission Report – Ghouta, *supra* note 7, at 7 (reporting the weather conditions were ideal for increasing the potency of chemical weapon deadliness for sarin gas); HRW – Analysis on Ghouta, *supra* note 26, at 4 (observing the likelihood of the population’s increased vulnerability and exposure to chemical attacks given that the morning prayers had ended shortly before the initiation of the attacks).

of women and children.<sup>225</sup> Of those civilians that survived, the mass majority reported the death of at least two family members as a result of the attacks.<sup>226</sup> As is expected of chemical weapons use, the attacks also afflicted first responders thereby adding to the psychological trauma.<sup>227</sup> In the context of other suspected uses of chemical weapons, an inference is almost not even required to interpret the clear message of fear from the attack on Ghouta that “transcends beyond its immediate action in terms of time, geographic space and direct victims.”<sup>228</sup>

#### D. *The War Crime of Attacking Civilians*

War crimes under Article 8 of the Rome Statute are distinguished from Article 7 crimes against humanity offenses by the included nexus of the offense to an armed conflict.<sup>229</sup> Civilians are included as members of a protected class from attack during or in connection with armed conflicts under the Geneva Conventions.<sup>230</sup> Attacking civilians in connection with

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225. *Syria Chemical Attack: What We Know*, *supra* note 3.

226. U.N. Mission Report – Ghouta, *supra* note 7, at 19.

227. *Id.*

228. Knoope, *supra*, note 210.

229. Compare Rome Statute, *supra* note 103, art. 8 (listing war crime offenses during either an “international armed conflict,” “armed conflict not of an international character,” or both) *with Elements of Crimes*, *supra* note 172, art. (7) (listing elements for various crimes against humanity).

230. “Common Article 3,” identical throughout Geneva Conventions I–IV, protects “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms . . .” in an ongoing “armed conflict not of an international character.” Geneva Convention Relative to the Protection of the Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31. Although the armed conflict nexus was maintained, the protections afforded to this class of persons under Common Article 3 was extended in Protocol I beyond its original scope to include any conflict “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.” Protocol I, *supra* note 193, Preamble.

Under Part IV, the “basic rule” for ensuring “respect and protection of the civilian population and civilian objects” requires that “the Parties to the conflict shall at all times *distinguish* between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” *Id.* art. 48 (emphasis added). As further clarification of the duty to *distinguish* (discriminate) between civilian and military targets, Protocol I requires:



an armed conflict is, therefore, a listed offense under the Rome Statute in both the internal armed conflict and international armed conflict scenarios.<sup>231</sup> Under the ICC's *Elements of Crimes*, the elements for the offense are: (1) "[t]he perpetrator directed an attack;" (2) "[t]he object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;" (3) "[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in the hostilities to be the object of the attack;" (4) "[t]he conduct took place in the context of and was associated with [as applicable here] an armed conflict not of an international character;" and (5) "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict."<sup>232</sup>

Here, the added element of a nexus to an armed conflict and the perpetrator's awareness of it is safely presumed. Additionally, the remaining listed elements can be proven in a near identical manner with near identical evidence as its inter-article counterparts—Article 7's crime against humanity for murder,<sup>233</sup> or alternatively, crime against humanity for extermination.<sup>234</sup> However, a crucial distinction can be made in crossing the inter-article divide from crimes against humanity into the realm of war crimes. The war crime offenses reveal a focus on specific *mens rea* components—the *intentional* decision to attack and its subsequent

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Attacks shall be limited strictly to military objectives. . . . [M]ilitary objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

*Id.* art. 52(2).

Protocol I also requires *proportionality* in the calculus of a military attack in which civilians are likely to be harmed. "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated" is therefore prohibited. *Id.* art. 51(5)(b) (emphasis added).

231. Rome Statute, *supra* note 103, art. 8(b)(i), (e)(i).

232. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(i). Alternatively, the same elements are required for international armed conflict related attacks on civilians under Article 8(2)(b)(i). *Id.* art. 8(2)(b)(i).

233. *Id.* art. 7(1)(a). Refer to the earlier discussion of the elements for "the crime against humanity of murder." *Supra* note 188.

234. *See id.* art. 7(1)(b) (discussing the elements for crimes against humanity that deal with extermination).

orchestration;<sup>235</sup> a *deliberate* and/or *intentional* disregard of the obligations to (1) discriminate in military targeting, (2) use proportionate force, and (3) safeguard members of protected classes; and the contextual *mental awareness* of an armed conflict.<sup>236</sup> In terms of the offense of attacking

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235. Under *Elements of Crimes*, the various elements for each offense listed are generally separated and sequentially ordered by (1) conduct, (2) consequences (results), and (3) circumstance. *Id.*, art. 7 Intro. Any mental elements are listed after the affected conduct, consequence, or circumstance, and any contextual circumstances are listed last. *Id.* In terms of the war crime of attacking civilians, the conduct element is “the perpetrator directed an attack.” *Id.* art. 8(2)(e)(i). The circumstance of the conduct is that the attack targeted a civilian population as its military objective. *Id.* art. 7 Intro. The mental element is the intention of the attack to target a civilian population. *Id.* art. 8(2)(e)(iii). As a war crime, the offense next includes the “contextual circumstance” element of the offense’s nexus to an armed conflict. *Id.* art. 7 Intro. It is followed by another “mental element affecting” the contextual circumstance element that requires the perpetrator to have actual knowledge of the armed conflict. *Id.*

236. Compare *id.* art. 8(2)(e)(i) (singling out as separate elements, the violative yet *intended object* of the attack, the *actual awareness* of the context of the attack in an armed conflict, and the *perpetrator’s direction* (decision) that the attack take place in disregard of its violative nature), with *id.* art. 7(1)(b) (looking to the *result* of violative conduct, its *role in a larger scheme* of similar achievement, and the *conduct’s context* in a “*widespread or systematic attack*” as known by the perpetrator).

There are some areas where the inter-article divergence is not as readily apparent. See e.g., *id.* art. 8(2)(a)(i) (listing the result-oriented focus of the first element common to Article 7 offenses— “[t]he perpetrator killed one or more persons”—in the war crime of willful killing). This is in part due to some overlap between the concepts of Crimes Against Humanity (originally applied primarily against nation-states) and War Crimes (allowing prosecutorial application against individuals). See generally, *id.* art. 7 (focusing on the results of an “attack directed against a civilian population”); *id.* art. 8 (requiring the perpetrator’s awareness of an armed conflict in the decision to attack a civilian population). However, the result-oriented element is present in only a minority of the offenses listed under war crimes. See *id.* art. 8(2)(a), (2)(c) (outlining Article 8 offenses that identify an element related to the result of illegal conduct similar to Article 7 offenses). A majority of Article 8 offenses do not include a result-oriented component at all. *Id.* art. 8. Moreover, even under those Article 8 offenses in the minority, there still exists a gravitation in focus on the decisional disregard of the Geneva Conventions and customary international law on the rules of war. See e.g., *id.* art. 8(2)(a)(i) (associating the result-oriented element of having “killed one or more persons” with the specific *mens rea* component—*intentional disregard* of the perpetrator’s *actual knowledge* of the victims’ protected status in the context of an armed conflict).

Therefore, at the risk of over-simplification, several conclusions might be safely reached. First, it appears that the crimes against humanity category focuses on the overall mass effect (result) of conduct violating a recognized legal obligation (without an armed conflict nexus), whereas the war crimes category focuses on the intentional decision—assuming successful execution—to violate that same legal obligation (with an armed conflict nexus). Second, distinguishing between the two chapters in dealing with a common nucleus of facts appears to be determined by the express (and presumably intentional) statutory-like separation of the elements. “*Expressio unius est exclusio alterius*” [the express mention of one excludes all others]. See *id.* art. 7 (including only that the attack target a civilian population); Int’l Crim. Ct., *Id.* art. 8 (requiring that the perpetrator be aware of “the existence

civilians as a war crime, the *mens rea* revolves around the *direction* of the attack (as the conduct) and not the attack itself.<sup>237</sup> It is safe to say that the decision to attack—with its requisite advanced planning and subsequent orchestration—against a densely populated urban district utilizing indiscriminate weapons with payloads of mass destruction sufficiently covers any additional *mens rea* focus.<sup>238</sup> This leaves the charge of attacking civilians as a war crime in a more than a viable state.<sup>239</sup>

E. *The War Crime of Employing Poison or Poisoned Weapons, and the War Crime of Employing Prohibited Gases, Liquids, Materials or Devices*

The “war crimes of employing poison or poisoned weapons” and the “war crime of employing prohibited gases, liquids, materials or devices” share a number of common roots, including history.<sup>240</sup> Consequently, the

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of an armed conflict”); *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.”).

For instance, in Article 8 for war crimes, elements dealing with the mental components are separated out to out-populate the single element, if any, dealing with the result-oriented components of the offense. See, e.g., *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(i) (enumerating the elements of the crime against humanity of extermination). In reverse fashion, under Article 7 for crimes against humanity, the center of focus is the offense’s result with the mental component as a tangential qualifier. E.g., *id.* art. 7(1)(b). The result-oriented component—or “consequence” element which often remains unseparated from the “conduct” element—is listed first, followed by the “contextual circumstance” element of the “widespread or systematic attack” requirement in Article 7 offenses. See *id.* art. 7 Intro (discussing the *Elements of Crimes* author’s deliberate sequencing of elements based on its character and qualifying properties). The contextual circumstance element is always followed by a “mental element affecting” the contextual circumstance and not the result—or at least, not directly. See, e.g., *id.* art. 7(1)(b) (identifying the elements of the crime against humanity of extermination).

237. *Id.* art. 8(2)(e)(i).

238. *Id.*

239. See *id.* art. 8(2)(e)(i) (detailing the elements of the war crime of attacking civilians); U.N. Mission Report – Ghouta, *supra* note 7, at 4–5 (assessing the Ghouta attack’s impact on the civilian population).

240. Although banned multilaterally in The Hague Conventions of 1899 and 1907, the modern use of chemical weapons begins with World War I. Chemical Weapons, UNODA, *supra* note 206. During the course of the war, both factions conducted attacks involving the incorporation of chemical agents into artillery shells and other munitions as a means of increasing battlefield casualties through death or debilitating suffering. *Id.* The Hague Convention of 1899, although largely ignored, initially prohibited “the use of projectiles the object of which is the diffusion of asphyxiation or deleterious gases.” Hague Convention (IV,2) Laws of War: Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899. In part because of the hypothetical scenario where chemical agents could be delivered through non-projectile means, The Hague Convention of 1907 changed and separated the language into the

language employed in both offenses shares familiar statutory language to the common historical lineage.<sup>241</sup> As a war crime, the common two elements of the armed conflict nexus and the perpetrator's awareness of the armed conflict are required as a matter of course.<sup>242</sup> The additional required elements specific to the criminal employment of poison or poisoned weapons include:

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.<sup>243</sup>

Similarly, the required elements specific to the criminal employment of prohibited gases, liquids, materials or devices include:

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.<sup>244</sup>

As applied to the events at Ghouta, the facts are sufficient to satisfy the elements for both offenses. The employment of Sarin (deployed in liquid

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prohibitions against "employ[ing] poison or poisonous weapons," and "employ[ing] arms, projectiles, or materials calculated to cause unnecessary suffering." Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 23 Oct. 18, 1907; TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 10 (1992). The outrage following World War I sparked the signing of the Geneva Protocol in 1925, which prohibited, as universally accepted international law, "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices . . . ." Geneva Protocol, *supra* note 14; Chemical Weapons, UNODA, *supra* note 206. However, one of the loopholes in the Geneva Protocol was that it did not prohibit the further development and stockpiling of chemical weapons. *Id.* This was rectified by very broad prohibitions in the Chemical Weapons Convention in 1992. Chemical Weapons Convention, *supra* note 16, art. 1.

241. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 278–79 (2d ed. 2016).

242. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii).

243. *Id.*

244. *Id.* art. 8(2)(e)(xv).

form but converted to a gas upon impact) satisfies the “substance” requirement<sup>245</sup> for the poison offense, as well as the offense for employment of a gas.<sup>246</sup> Sarin, given its effects on the human body,<sup>247</sup> satisfies both the “toxic properties” as well as the “asphyxiating” characteristic requirement under the second elements.<sup>248</sup> The use of Soviet M-14 and 330mm “Volcano” rockets carrying payloads of Sarin also fulfills the offered delivery system alternatives offered in each of the offenses’ first elements.<sup>249</sup>

The problem with these two listed offenses is not a question of whether they are chargeable, but rather, whether they are actually (despite their historical evolution) the same offense. A brief inspection reveals that the first listed offense—referring to the employment of a “substance” as the conduct element—seems broader than the other, since the other gravitates toward a gas, albeit with the allowance of analogous substitutes.<sup>250</sup> Furthermore, the former contemplates the use of a delivery system which the latter does not.<sup>251</sup> The facts of the case, however, could be determinative in whether such a violation exists. As such—since the facts of the case *can*<sup>252</sup> satisfy the elements of both offenses—charging both viable offenses in the alternative would seem prudent.<sup>253</sup>

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245. It is worth noting, as relating to the underlying dichotomy between the war crimes and crimes against humanity categories, both offenses discussed here, neither one requires the actual death or injury of its target. They only require that the perpetrator employ “a gas or other analogous substance.” *Id.* art. 8(2)(e)(xiii), (2)(e)(xiv).

246. *Id.* art. 8(2)(e)(xiii), (2)(e)(xv).

247. U.N. Mission Report – Ghouta, *supra* note 7, at 7.

248. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii), (2)(e)(xv).

249. *Id.* art. 8(2)(e)(xiii) (referring to “a weapon that releases a substance as a result of its employment”).

250. *Id.* art. 8(2)(e)(xiii), (2)(e)(xv).

251. Compare *id.* art. 8(2)(e)(xiii) (“The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.”), with *id.* art. 8(2)(e)(xiv) (“The perpetrator employed a gas or other analogous substance or device.”).

252. Under the first element for employing poison or poisoned weapons, the fact a rocket-artillery delivery system was utilized (to carry Sarin) may be used to satisfy the first element instead of the fact that Sarin itself was utilized. See *id.* art. 8(2)(e)(xiii) (including, as part of the element, the use of “a substance or a weapon that releases a substance as a result of its employment.”). Although this application of differing facts may technically escape the potential for a double jeopardy violation legalistically, it is questionable if the ICC’s judiciary will accept it.

253. Although multiple charging is allowed, since the conviction of one *might* preclude the conviction of the other, giving due consideration to judicial resources may be the wiser course.

## VI. LOOKING FOR POTENTIAL VIOLATIONS OF THE PRINCIPLE OF NE BIS IN IDEM (DOUBLE JEOPARDY)

Although multiple charging from a common nucleus of fact is allowed, multiple convictions resulting from those charges is a different story. It should be expected that multiple charges will give rise to the defense argument that many of the charged offenses are in fact lesser-included-offenses of other charges (*concoirs apparent*)<sup>254</sup> or alternatively, the same offense in fact.<sup>255</sup> If historical case law is afforded any authoritative weight by the ICC, this defense argument will find only minimal success. The *Blockburger* test, as expressed by the appeals chamber in both *Kupreškić* and the *Čelebići*, determines whether the crimes are distinct:

[M]ultiple criminal convictions entered under different statutory provision but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld.<sup>256</sup>

The *Čelebići* court used this test to determine that even very similar offenses arising from the same core facts could result in technically distinct

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254. *Concoirs apparent* is a false or apparent concurrence where one charged offense is completely encompassed by another in addressing the same conduct (lesser-included offense). Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 LEIDEN J. OF INT'L L., 715, 723 (2009). *Concoirs ideal*, on the other hand, is where a single course of conduct gives rise to two distinctly separate offenses concurrently. *Id.* *Concoirs ideal* does not violate the *ne bis in idem* principle. See Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT'L CRIM. L. REV., 217, 217 (2003) (describing *ne bis in idem* at double jeopardy).

255. The *ne bis in idem* principle is expressly incorporated in the Rome Statute under Article 20. The relevant provision for the situation at hand states in relevant part that: "[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." Rome Statute, *supra* note 103, art. 20(1).

256. *Kupreškić*, Appeals Judgment, *supra* note 184, ¶ 387 (citing *Čelebići* Case, *supra* note 165, ¶ 412–13).

convictions.<sup>257</sup> However, the tribunal applied it in both directions in order to not only avoid conviction on the same offense twice, but also to

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257. The international adoption of the *Blockburger* test as a means of preventing double jeopardy is not a complete adoption of the protection afforded in the United States. Dax Eric Lopez, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 VAND. J. TRANSN'L L. 1263, 1291–92 (2000) (describing the difficulty in applying the *Blockburger* test internationally). The adopted portion arguably focuses too much on language and format technicalities and statutory construction happenstance rather than the substance of the crime. *Id.* A deeper examination of double jeopardy protections in the United States reveals, arguably, a more balanced approach. *Id.* at 1302.

Texas law, for instance, may offer insight on how the ICC may craft a better approach. In a double jeopardy challenge arising out of multiple convictions from a single trial, the appellate court must first apply the *Blockburger* test as a starting point using the cognate-pleadings approach. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (asking whether each statute requires proof of an additional fact which the other does not); *Hall v. State*, 225 S.W.3d 524, 526, 535, 537 (Tex. Crim. App. 2007) (adopting the cognate-pleadings approach which “looks to the facts and elements as alleged in the charging instrument, and not just the statutory elements of the offense”). Second, the appellate court then considers the non-exclusive list of *Ervin* factors in determining if the two offenses are in fact “the same.” *Bigon v. State*, 252 S.W.3d 360, 371 (Tex. Crim. App. 2008); *Ex parte Ervin*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). However, application of the *Ervin* factors will vary depending on the results of the *Blockburger* test. If the elements of the offenses are identical under *Blockburger*, there is a judicial presumption that the offenses are the same absent clear legislative intent to the contrary; if they are different, the judicial presumption is that the offenses are different absent clear legislative intent. *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015). The *Ervin* factors, include:

- (1) whether [the] offenses are in the same statutory section;
- (2) whether the offenses are phrased in the alternative;
- (3) whether the offenses are named similarly;
- (4) whether the offenses have common punishment ranges;
- (5) whether the offenses have a common focus;
- (6) whether the common focus tends to indicate a single instance of conduct;
- (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and
- (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.

These factors are not exclusive, and the question ultimately is whether the legislature intended to allow the same conduct to be punished under both of the offenses.

*Bigon*, 252 S.W.3d at 371.

The court remedies a double jeopardy violation by applying the “most serious offense” test. *Id.* at 372–73; *see also Landers v. State*, 957 S.W.2d 558, 560 (Tex. Crim. App. 1997) (explaining the test helps “eliminate[] the arbitrariness of relying [on how a statute is structured . . .]”). The court looks first to see which conviction is the most serious. *Bigon*, 252 S.W.3d at 372–73. This is determined by examining the respective sentences as *awarded by the jury* and deciding whether they run concurrently or not. *See id.* at 372–73 (emphasizing the need to evaluate more than just “the sentence imposed to determine which of these offenses is the most serious”); *see also Ex parte Cavazos*, 203 S.W.3d 333,

avoid *concours apparent* scenarios.<sup>258</sup> In one instance, the ICTY appeals chamber found that the inter-article<sup>259</sup> convictions for willful killing—as a grave breach of the Geneva Convention No. IV—was a legitimately distinct offense from murder—as a violation of the laws and customs of war.<sup>260</sup> However, it also concluded that one offense subsumed the other.<sup>261</sup>

<b>Willful Killing</b> (as a grave breach of the Geneva Conventions under ICTY Statute Article 2)	<b>Murder</b> (as a violation of the laws and customs of war under ICTY Statute Article 3)
a. death of the victim as the result of the action(s) of the accused,  b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,  c. and which he committed against a protected person. <sup>262</sup>	a. death of the victim as a result of an act of the accused,  b. committed with the intention to cause death,  c. and against a person taking no active part in the hostilities. <sup>263</sup>

338 (Tex. Crim. App. 2006) (extending discretion to the fact-finder and holding that “the ‘most serious’ offense is the offense of conviction for which the greatest sentence was assessed”). Thus, a third-degree felony conviction with a ten-year imprisonment sentence would be the “most serious” offense compared to a second-degree felony with only a two-year sentence of imprisonment. *See Bigon*, 252 S.W.3d at 372–73 (evaluating the degrees of the offenses and the respective sentences in determining which offense was the most serious). In the case of a tie, the court should then look to the degrees of the offenses. *Id.* at 373. If they are also the same, the court should look at other factors such as restitution. *Cavaños*, 203 S.W.3d at 338 (determining the “most serious” offense based on the amount of fines or restitution attached to the conviction after finding the sentences’ imprisonment time and felony degrees were equal).

258. Čelebići Case, *supra* note 165, ¶¶ 412–13.

259. Under the ICTY Statute, the crime of “willful killings” is listed under Article 2. The crime of “murders,” however, is listed under Article 3. Int’l Crim. Tribunal for the Former Yugoslavia, *Updated Statute for the International Criminal Tribunal for the Former Yugoslavia*, art. 2, 5 (2009).

260. Čelebići Case, *supra* note 165, ¶¶ 414–23.

261. *Id.* ¶ 423.

262. *Id.* ¶ 422.

263. *Id.* ¶ 423.



The *Čelebići* appeals chamber identified a “materially distinct element” in the willful killing elements that was not present in the offense of murder.<sup>264</sup> Specifically, willful killing under Article 2 requires that the victim classify as a “protected person.”<sup>265</sup> Since the classification of “protected person” was more definitive than “a person taking no active part in the hostilities,” the offense required “proof of a fact not required by the elements of murder.”<sup>266</sup> In reverse, however, the same could not be said to be the case. “[T]he definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of willful killing under Article 2.”<sup>267</sup> Since the Article 2 offense of willful killing possessed the additional fact requirement, it was determined to be the conviction with the more specific provision and thereby upheld.<sup>268</sup> The Article 3 conviction for murder, in turn, was dismissed.<sup>269</sup>

As applied here, if President al-Assad were to be convicted of one of the convictions listed below, the defense is likely to challenge that subsequently charging the similar accompanying offense would be inappropriate as it would create the possibility for an impermissible dual conviction:

1. The crime against humanity of murder and the crime against humanity of extermination;
2. The war crime of attacking civilians and the crime against humanity of murder (or alternatively, extermination); and
3. The war crime of employing poison or poisoned weapons and the war crime of employing prohibited gases, liquids, materials or devices.

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264. *Id.*

265. *Id.*

266. *Id.* ¶ 421–23.

267. *Id.* ¶ 423.

268. *See id.* (“Because wil[ly]ful killing under Article 2 contains an additional element and, therefore, more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.”); *see also* Kupreškić, Appeals Judgment, *supra* note 184, ¶ 387 (ruling a conviction should be made under the more specific provision).

269. *Čelebići* Case, *supra* note 165, ¶ 423. The tribunal used identical methods and reasoning in adjudicating several “double convictions” including “wil[ly]fully causing great suffering or serious injury to body or health” under Article 2 and “cruel treatment” under Article 3; Article 2 torture and Article 3 torture; and “inhuman[e] . . . and cruel treatment,” respectively under Articles 2 and 3. *Id.* ¶ 424–26.

Utilizing the *Blockburger* test, the results are mixed. In the first category, the intra-Article 7 charges for murder and extermination as crimes against humanity cannot likely coexist as simultaneous convictions. Although the extermination offense is materially distinct from the offense of murder, the reverse is not true.<sup>270</sup>

<b>Crime Against Humanity of Murder</b> <i>(Elements of Crimes, art. 7(1)(a))</i>	<b>Crime Against Humanity of Extermination</b> <i>(Elements of Crimes, art. 7(1)(b))</i>
<ol style="list-style-type: none"><li>1. The perpetrator killed one or more persons.</li><li>2. The conduct was committed as part of a widespread or systematic attack against a civilian population.</li><li>3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>271</sup></li></ol>	<ol style="list-style-type: none"><li>1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.</li><li>2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.</li><li>3. The conduct was committed as part of a widespread or systematic attack against a civilian population.</li><li>4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>272</sup></li></ol>

270. *Elements of Crimes*, *supra* note 172, art. 7(1)(a), (1)(b).

271. *Id.* art. 7(1)(a).

272. *Id.* art. 7(1)(b).

Although the offense of extermination provides a more specific alternative, the *required* facts for the first elements in both offenses are the same. Dividing by the common denominator—the last two elements since they are identical—leaves the offense of extermination with an additional required fact that is not present in the offense of murder—the “mass killing” conduct element.<sup>273</sup> The offense of murder, on the other hand, has no divergent elements remaining, leaving it subsumed by extermination.<sup>274</sup> Therefore, provided both charges end in conviction, the ICC, under application of the *Blockburger* test, will most likely uphold the offense of extermination and dismiss the offense of murder, assuming they both rely on the same event facts.<sup>275</sup>

In the second category of challenged convictions, the defense will likely challenge the war crime of attacking civilians as duplicative of its Article 7 counterparts with no success.<sup>276</sup>

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273. *Elements of Crimes*, *supra* note 172, art. 7(1)(a), (1)(b).

274. This assumes, of course, that the only facts utilized by the offense are mostly limited to the events at Ghouta. Obviously, an actual prosecution might be able to maintain this conviction if other events are incorporated as part of the support for conviction.

275. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding “the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not”).

276. For our purposes here, we will assume that the crime against humanity counterpart is the offense of extermination since it would be the likely survivor if simultaneously charged with the intra-article offense of murder. Kupreškić, Appeals Judgment, *supra* note 184, ¶ 387 (holding a conviction should be made under the more specific provision).

<b>War Crime of Attacking Civilians</b> ( <i>Elements of Crimes</i> , art. 8(2)(e)(i))	<b>Crime Against Humanity of Extermination</b> ( <i>Elements of Crimes</i> , art. 7(1)(b))
<ol style="list-style-type: none"><li>1. The perpetrator directed an attack.</li><li>2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.</li><li>3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.</li><li>4. The conduct took place in the context of and was associated with an armed conflict not of an international character.</li><li>5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>277</sup></li></ol>	<ol style="list-style-type: none"><li>1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.</li><li>2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.</li><li>3. The conduct was committed as part of a widespread or systematic attack against a civilian population.</li><li>4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>278</sup></li></ol>

277. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xi).  
278. *Id.* art. 7(1)(b).

Dividing by the common denominators, in this case, leaves all of the elements remaining. The first elements by themselves—both referencing the *actus reus* of the offense—mutually require “proof of a fact not required by the other.”<sup>279</sup> Therefore, the ICC will likely allow both convictions to stand if challenged.<sup>280</sup>

In the final category of potential challenge, the likelihood of dismissal of one of the charges is high. Without too liberal of an interpretation, it is possible that the ICC may find that these two offenses are in fact the same as applied here.<sup>281</sup>

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279. Kupreškić, Appeals Judgment, *supra* note 184, ¶ 387 (citing Čelebići Case, *supra* note 165, ¶¶ 412–13).

280. Allowing both convictions to stand would be arguably consistent from a policy standpoint as well as the current technical and legalistic view. As discussed earlier, the different focus (or gravamen) of each offense across the intra-article divide is indicative of a very different legislative intent in the creation of each. See *Elements of Crimes*, *supra* note 172, art. 7 Intro., art. 8 Intro (discussing the focus of the respective offenses assigned to each article); *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015) (indicating the presumption of double jeopardy may be rebutted by a clear “legislative intent to impose multiple punishments”) (citing *Missouri v. Hunter*, 459 U.S. 359, 366–68 (1983)).

281. *But see Blockburger*, 284 U.S. at 304 (“A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”) (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (Mass. 1871)).

<b>War Crime of Employing Poison or Poisonous Weapons</b> <i>(Elements of Crimes, art. 8(2)(e)(xiii))</i>	<b>War Crime of Employing Prohibited Gases, Liquids, Materials or Devices</b> <i>(Elements of Crimes, art. 8(2)(e)(xiv))</i>
<ol style="list-style-type: none"><li>1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.</li><li>2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.</li><li>3. The conduct took place in the context of and was associated with an armed conflict not of an international character.</li><li>4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>282</sup></li></ol>	<ol style="list-style-type: none"><li>1. The perpetrator employed a gas or other analogous substance or device.</li><li>2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.</li><li>3. The conduct took place in the context of and was associated with an armed conflict not of an international character.</li><li>4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>283</sup></li></ol>

Removing the obvious common Article 8 denominators leaves the first two elements of each offense remaining. Similarly, each offense’s respective second element, as qualifying circumstance elements to the preceding conduct element, can also be removed. Neither “requires proof of a fact not required by the other.”<sup>284</sup> A comparison of the respective conduct elements, however, can produce varying results. Since both allow

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282. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii).  
283. *Id.* art. 8(2)(e)(xiv).  
284. Kupreškić, Appeal Judgment, *supra* note 186, ¶ 387 (citing Čelebići Case, *supra* note 165, ¶ 412–13).

an alternative conduct, but do not require it,<sup>285</sup> the alternative conduct options can be ignored.<sup>286</sup> This leaves the employment of a “substance” versus the employment of a “gas.” Since a “gas” is a narrower subcategory of “substance,” the provision requires “proof of a fact not required by the other.”<sup>287</sup> Hence, the ICC is likely to uphold a conviction based on the War Crime of Employing Prohibited Gases, Liquids, Materials or Devices and dismiss its *concorrs apparent* counterpart.<sup>288</sup>

Therefore, the most likely surviving candidate charges for conviction are: (1) the crime against humanity of extermination; (2) the war crime of attacking civilians; and (3) the war crime of employing prohibited gases, liquids, materials or devices.

## VII. ATTACHING INDIVIDUAL CRIMINAL LIABILITY TO PRESIDENT AL-ASSAD

Assuming that at least some (if not all) of the above charges are sufficient enough as offenses that were in fact committed, attaching liability directly to President al-Assad as an individual might require an extra step. A major factor to be considered is that President al-Assad is an official head of state. From a defense perspective, this entitles him, arguably, to some level of sovereign immunity. Additionally, if it cannot

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285. See *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii), (2)(e)(xiv) (referring to the alternatives of “a weapon that releases a substance as a result of its employment” and “other analogous substance or device”).

286. This is especially so since the facts at hand are flexible enough to allow conviction on the primary conduct stated by the elements. See *id.* (listing the elements of the war crimes associated with the use of toxic substances); U.N. Mission Report – Ghouta, *supra* note 7, at 6–7 (discussing the aftermath of the chemical weapons attack in Ghouta). However, it is worth noting that under the alternative conduct options, one only requires a “substance” whereas the other requires the substance be analogous to a gas. *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii), (2)(e)(xiv). This implies a greater specificity to the employment of a prohibited gas provision compared to the poisoned weapon offense. In the likely event that one is said to subsume the other, this provides more justification for upholding the conviction for employing prohibited gases, liquids, materials or devices. See *id.* art. 8(2)(e)(xiii), (2)(e)(xiv) (enumerating the requirements for the offenses of employing toxic substances); Čelebići Case, *supra* note 165, ¶¶ 412–13 (upholding an Article 2 conviction because it applied more specifically to the situation than an Article 3 offense).

287. See *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiv) (specifying the substance of gas in the first two elements); Čelebići Case, *supra* note 165, ¶¶ 412–13 (emphasizing the need to choose between two offenses when there is no materially distinct element).

288. See *Elements of Crimes*, *supra* note 172, art. 8(2)(e)(xiii), (2)(e)(xiv) (outlining the offenses, the latter of which contains a specific description of what a “substance” could be); Čelebići Case, *supra* note 165, ¶¶ 413 (providing a method of deciding which offense should prevail).

be proven that he *directly ordered* the attacks,<sup>289</sup> the defense may present a third-party perpetrator theory arguing that responsibility falls on the shoulders of a scapegoat subordinate acting rogue. As it is not uncommon for a culpable superior to deliberately obfuscate his connection to such a massive crime, this provides the defense an additional obstacle to block a successful prosecution and conviction to the ultimate authorities who backed its commission.<sup>290</sup> For the purposes of this paper, it will be safely

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289. Under basic theories of criminal liability, a defendant is culpable for an offense if he or she committed, planned, co-perpetrated, or ordered an offense to be carried out. See Cliff Farhang, *Point of No Return: Joint Criminal Enterprise in Brđanin*, 23 LEIDEN J. INT'L L., 137, 140–42 (2010) (assigning “liability for criminal conduct dispensed by a plurality pursuant to certain plan or objective”).

290. In *Blaškić*, for instance, General Tihomir Blaškić was charged with war crimes for the derivative atrocities pursuant to Order D269. *Blaškić Case*, Appeal Judgment, *supra* note 194, ¶¶ 1–3. At the trial level, Blaškić was found directly liable for ordering the crimes, and alternatively, liable from a superior responsibility standpoint for war crimes committed at Ahmici, Santici, Pirici, and Nadioci in 1993. *Id.* Under Order D269, HVO units subordinate to Blaškić were instructed to “occupy the defense region, blockade villages and prevent all entrances to and exits from the villages.” *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 435 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (citation omitted). “[I]n the event of open attack activity by the Muslims’ those units should ‘neutralize them and prevent their movements with precise fire’ in counterattack. *Id.* Furthermore, all units were to be tactically prepared to begin hostilities by 5:30 AM. *Id.* Prior orders, including the economic preservation of fuel and modes of combat, were to be complied with. *Id.* ¶ 434.

The trial court interpreted Order D269 as the order to attack leading to ethnic cleansing of the area as part of the creation of a “common Croatian state” by establishing a regional Croatian majority. *Id.* ¶¶ 341, 469–89. The actual beginning of the combat corresponded to the time given under Order D269. *Id.* With regard to the torching of residences and victims, “[i]t is hard to imagin[e] how the systematic use of petrol as a combat weapon could have been possible in that period of fuel shortage without the approval of the military and/or civilian authorities.” *Id.* ¶ 470. As gathered from witness testimony, the execution of Muslim inhabitants appeared to have been in accordance to orders: “[W]e all know that Blaškić has ordered that no prisoners of war were of interest to him, only dead bodies.” *Id.* ¶ 472 (citation omitted).

Under the alternative theory of criminal liability where Order D269 was not an attack order, the trial chambers found culpability because (1) Blaškić knew that some of the troops—including military police—were guilty of war crimes, and (2) the preventative order of January 18, 1993—ordering soldiers known to be criminals to be taken out of positions where they could do criminal harm—were unreasonable and ineffective. *Id.* ¶¶ 442–94.

However, the appeals chamber found the ruling “wholly erroneous” and reversed it. *Blaškić Case*, Appeal Judgment, *supra* note 194, ¶ 18 (citation omitted). Determining the order to be “militarily justified” by the reasonable belief of imminent attack, the appeals chamber found no evidence that the order was given with “clear intention that the massacre would be committed[,]” nor any other link between the atrocities as a subordinate response to the Order D269. *Id.* ¶ 334 (citation omitted). Additionally, there was insufficient awareness of a substantial likelihood that the atrocities



assumed that direct liability will be hard—if not impossible—to sufficiently prove, forcing the prosecution to find an alternate means.

Fortunately, there are several doctrines of liability under international law that could be utilized to overcome any such obstacles. If direct liability is somehow barred,<sup>291</sup> President al-Assad's culpability may still be provable under the doctrine of superior responsibility or through indirect co-perpetration.<sup>292</sup> However, as a head of state, it is likely that the doctrine of superior responsibility will be preferred by the prosecution.<sup>293</sup> Under this theory, culpability can attach if President al-Assad had: (1) actual or sufficient constructive knowledge that subordinates were committing offenses, and (2) President al-Assad failed to take any necessary or reasonable measures to prevent such offenses or to punish

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would happen as proof beyond a reasonable doubt for criminal culpability purposes. *Id.* ¶ 444. Consequently, Blaškić was sentenced to only nine years of imprisonment for lesser charges which included the inhumane treatment of prisoners of war. *Id.* ch. XIII.

291. Under general criminal principles of liability, if direct liability cannot be proven, culpability may typically still be found if the accused: instigated, incited, solicited, attempted, aided and abetted, was complicit or conspired with the direct perpetrators during the life of the crime, served as an accessory before-the-fact, served as an accessory after-the-fact, or otherwise knowingly facilitated the commission of the crime. Ian Leader-Elliot, *Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon*, 9 BUFF. CRIM. L. REV. 391, 406–07 (2006). However, in the realm of international law, as numerous countries follow sometimes diverging legal philosophies regarding criminal liability, finding a clear-cut road to establishing criminal culpability can be a challenge. *See id.* at 410 (discussing distinctions between other countries' criminal liability requirements).

292. *See* Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of Rome Statute, ¶ 297 (Jan. 23, 2012) (utilizing "indirect co-perpetration" to indict Omar Al Bashir for crimes against humanity in Sudan). Indirect Co-Perpetration requires the following:

- (i) the suspect must be part of a common plan or an agreement with one or more persons;
- (ii) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).

*Id.*

293. The doctrine of superior responsibility is expressly provided for in the Rome Statute under Article 28, whereas indirect co-perpetration—though well established in its own right—is only statutorily implied and otherwise a creature of case law. Rome Statute, *supra* note 103, art. 28.

the offending subordinates upon discovery.<sup>294</sup> These elements can be separated out into several key components: (1) the *mens rea* component—

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294. Under Article 28 of the Rome Statute titled “Responsibility of Commanders and Other Superiors”:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Rome Statute, *supra* note 103, art. 28. Protocol I also discusses superior responsibility:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Protocol I, *supra* note 193, art. 86. Protocol I goes on to discuss duties on high commanders with certain knowledge of crimes that may be committed by subordinates:

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are

al-Assad sufficiently “had reason to know” of the offenses beforehand or after the fact; (2) the subordination component—those committing the offenses were in a superior-subordinate relationship with al-Assad; and (3) the failure of an existing legal obligation component—al-Assad unreasonably failed to fulfill a duty to either prevent the offense or punish those responsible after-the-fact.<sup>295</sup> Since al-Assad’s relationship with those who brought about the commission of the offense itself can affect the other component standards, the subordination component will be addressed first.

A. *The Superior-Subordinate Component: President al-Assad had a Superior-Subordinate Relationship as an “Effective Military Commander”*

Although the history of the doctrine of superior responsibility is still very loosely applied between the two types of superiors, Article 28 of the Rome Statute seems to establish some distinction between “military commander[s]” and “civilian” superiors.<sup>296</sup> However, regardless of which categories President al-Assad falls under, establishing culpability under a superior responsibility theory absolutely requires that a superior-subordinate relationship is established.<sup>297</sup> In other words, “a *position of command is indeed a necessary precondition* for the imposition of command responsibility.”<sup>298</sup>

This relationship can exist regardless of whether the superior qualifies as a *de jure* commander—formally accorded command authority by legally recognized entitlement—or as a *de facto* commander—informally and effectively possessing command authority under the circumstances.<sup>299</sup>

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necessary to prevent such violations of the Conventions or to this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

*Id.* art. 87.

295. See, e.g., Rome Statute, *supra* note 103, art. 28 (detailing when a “military commander” or other superior “effectively acting as a military commander” can be found liable for offenses committed by a subordinate).

296. Compare *id.* art. 28(a) (referring to “a military commander”), with *id.* art. 28(b) (referring to “superior and subordinate relationships not described in paragraph (a)”).

297. See Čelebići Case, *supra* note 165, ¶ 196 (“‘Command,’ a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term ‘control,’ which has a wider meaning, may encompass powers wielded by civilian leaders.”).

298. *Id.* ¶ 188.

299. See *id.* ¶¶ 192–99 (discussing the requirements of superior-subordinate relationships under both *de jure* and *de facto* commander situations).

Although the possession of a *de jure* command position may serve as significant indicia towards criminal liability as a superior, it is not necessarily dispositive.<sup>300</sup> Requiring otherwise would convert the superior responsibility standard into one of strict liability.<sup>301</sup> Instead, the dispositive factor is the possession by the commander of the “material ability” to “effectively control” subordinates to “prevent and punish the commission” of crimes.<sup>302</sup> “The doctrine of command responsibility is ultimately predicated upon the power of the superior to control acts of his subordinates.”<sup>303</sup> “Effective control,” however, is more than a mere “substantial influence,” but rather an “effective power to control the subordinate, in the sense of preventing or punishing criminal conduct.”<sup>304</sup> Although *de jure* command positions are not dispositive, “[t]his is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility”—even when dealing with informal or unofficial hierarchal structures.<sup>305</sup> Utilizing this dispositive factor, the possession of effective control over subordinates can extend the scope of the definition of “military commander” to include even civilian leaders.<sup>306</sup>

In the context of President al-Assad, the prosecution will more than likely be able to show effective control over the offending subordinate

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300. *Id.* ¶¶ 188–99 (“Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure* position as a commander.”) (citing the trial chamber).

301. *See id.* ¶¶ 198, 198 n.259 (finding “reliance on *de facto* control to establish superior responsibility does not amount to a form of strict liability”).

302. *Id.* ¶ 197. “In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.” *Id.*

303. *See id.* (quoting the trial chambers).

304. *Id.* ¶ 254.

305. *Id.* (quoting the trial chambers); *see id.* (“[I]t [is] apparent that [hierarchy and chains of command] need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.”).

306. The judgment in *Delalic* stated:

[C]ivilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control. Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. . . . The showing of effective control is required in cases involving both *de jure* and *de facto* superiors.

*Id.* ¶ 196.

forces under both a de jure relationship as well as a de facto one. As the legal head of state, President al-Assad is the de jure commander-in-chief of the regime's military with the legal prima facie authority to issue orders to both preventively control and punish those forces under his command. This offers a significant, though non-dispositive, showing of his command authority over the actual actors involved. Furthermore, from the effective control standpoint, given al-Assad's undisputed life-long hold over his dictatorial position—achieved through political and military force—it is easily inferred that any rogue elements operating outside of his established parameters or otherwise in disobedience of presidential directives would suffer punishment. In dictatorial fashion, therefore, President al-Assad, though he may allege himself a civilian, should qualify as a military commander for the purposes of the events at Ghouta.

B. *The Mens Rea Component: President al-Assad had More than Sufficient "Reason to Know"*

Under Article 28 of the Rome Statute, the *mens rea* component has two differing standards separating "military commander[s]" and "civilian" superiors.<sup>307</sup> Essentially, following a heightened negligence standard<sup>308</sup> for military commanders, it must be shown that the commander objectively "either knew or, owing to the circumstances at the time, should have known" of the commission of the offenses.<sup>309</sup> Alternatively, for a

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307. Compare Rome Statute, *supra* note 103, art. 28(a) (outlining the elements for when to hold "a military commander . . . criminally responsible"), with *id.* art. 28(b) (enumerating the instances where a "superior shall be criminally responsible").

308. The Model Penal Code defines criminal negligence as:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

309. Rome Statute, *supra* note 103, art. 28(a)(i). Although it would be only persuasive authority to the ICC, the United States' Army Field Manual, developed in line with international law, similarly states:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. . . . Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual

civilian (or de facto) superior, the Rome Statute requires that the “superior either knew, or consciously disregarded information which clearly indicated” the subordinate commission of offenses to have sufficient *mens rea* culpability.<sup>310</sup> The language leans heavily in favor of a narrower recklessness standard than required for military commanders.<sup>311</sup>

However, although one standard appears heightened compared to the other, neither standard necessitates actual knowledge.<sup>312</sup> Even though there is no “automatic” duty to obtain information of subordinate offenses

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knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE ¶ 501 (1956).

310. Rome Statute, *supra* note 103, art. 28(b).

311. Regarding criminal recklessness, the Model Penal Code states:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

312. See Blaškić Case, Appeal Judgment, *supra* note 194, ¶¶ 304–40 (interpreting the knowledge requirement for criminal responsibility as satisfied in the absence of actual knowledge if the superior should have known about the future commission of crimes). In *Blaškić*, the appeals chamber, although reversing the finding on this point, agreed with the trial chamber, in theory, that “knowledge may be proved either through direct or circumstantial evidence.” *Id.* ¶ 304. The court in *Blaškić*, went on to state:

With regard to circumstantial evidence, . . . determining whether in fact a superior must have had the requisite knowledge it may consider inter alia the following indicia . . . :

- the number, type and scope of the illegal acts;
- the time during which the illegal acts occurred;
- the number and type of troops involved;
- the logistics involved, if any;
- the geographical location of the acts;
- the widespread occurrence of the acts;
- the speed of the operations;
- the *modus operandi* of similar illegal acts;
- the officers and staff involved;
- and the location of the commander at the time.

*Id.* ¶ 307.

attached to a superior's position, "responsibility can be imposed for deliberately refraining from finding out."<sup>313</sup> Failure to establish a sufficient "reason to know" by the prosecution would give rise to the defense of impossible performance.<sup>314</sup> Nevertheless, whether the superior "had reason to know" may be proven if the accused "*had information* which put him on notice that crimes had been committed by his subordinates . . . ."<sup>315</sup> Such information, under the "had reason to know" standard, would have to be of a nature that gives rise to a "reason to believe that crimes had been committed in light of the military conflict taking place at that time . . . ."<sup>316</sup>

The prosecutor, here, should be able to establish the *mens rea* component under either standard. However, since satisfying the seemingly stricter standard for civilian superiors necessarily satisfies the military commander standard, the seemingly stricter standard will be assumed to be the requisite one.<sup>317</sup> Regarding the attacks at Ghouta, there is publicized

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313. *Id.* ¶ 406.

314. In *Čelebići*, the trial chamber interpreted the "had reason to know" component, under the ICTY Statute, to not require a pure objectively reasonable person standard under the Doctrine of Superior Responsibility:

It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.

Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 395 (Int'l Trib. for the Former Yugoslavia Nov. 16, 1998).

315. Blaškić Case, Appeal Judgment, *supra* note 194, ¶ 407.

316. *Id.* ¶ 408.

317. Examining the *mens rea* component under the stricter standard is also advantageous because of the potentially ambiguous requirements under the Superior Responsibility Doctrine. *See* Blaškić Case, Appeal Judgment, *supra* note 194, ¶¶ 57, 63 (denying Blaškić's proposed theory that *actual knowledge* should be required for culpability and instead affirming the *Čelebići* interpretation of "had reason to know" as definitive in finding the requisite "knowledge" component through a non-exhaustive list of indicia for the court to consider).

Under Protocol I of the Geneva Conventions, Articles 86 and 87 make a *reverse* distinction—as *prima facie* compared to the Rome Statute—between a superior and a commander. Under Article 86, a superior's *mens rea* requirement can be satisfied "if they knew, or had information which should have enabled them to conclude in the circumstances at the time" that a subordinate was either engaging or about to engage in an offence. Protocol I, *supra* note 193, art. 86. Stricter language is used for a commander, requiring "any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach" of the Protocol, exercise

evidence establishing the existence of a formal authorization procedure of the Syrian regime in order to permissibly utilize chemical weapons.<sup>318</sup> This would entail necessarily either President al-Assad's direct authorization or such permission through his preapproved delegated authority. Furthermore, corroborating intelligence findings stated that not only was the attack part of a larger strategic push to "rid the Damascus suburbs of opposition forces," a senior official communicated the directive to responsible regime forces to cease operations and hide any evidence.<sup>319</sup> Even from a broader governmental policy standpoint, the integration of chemical weapons within the "classical tactical pattern" of bombardment followed by a ground offensive is reportedly "consistent, on a military level, with the Syrian armed forces' doctrine."<sup>320</sup> Even in the event that a rogue element utilized chemical weapons at Ghouta without the regime's permission, given the international community's incredulous media frenzy both in regards to alleged instances predating Ghouta<sup>321</sup> as well as in

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"necessary control" to prevent or punish. *Id.* art. 87. Since the use of chemical weapons also breaches Protocol I in regard to *proportionality* of acceptable military attacks (in addition to the simultaneous violation of the larger Geneva Conventions for use of prohibited weapons in light of its mass destruction), it is most probably a sound yet conservative legal strategy to apply the seemingly stricter standard since it can still meet with success.

318. "Permission to authorise [chemical weapons] has probably been delegated by President As[s]ad to senior regime commanders, such as [\*], but any deliberate change in the scale and nature of use would require his authorisation." JOINT INTELLIGENCE COMM., *supra* note 68, at 3. "[\*]" denotes redaction of certain senior commanders in the Syrian regime. Reports indicated al-Assad was intimately involved with the development of chemical weapons in Syria:

[T]he Syrian military responsible for filling munitions with chemical agents and for security at storage sites—'Branch 450' of the Syrian Scientific Studies and Research Centre (CERS)—was staffed only by members of the president's Alawite sect and was 'distinguished by a high level of loyalty to the regime.' Bashar al-Assad and certain members of his inner circle were the only ones permitted to give the order for the use of chemical weapons . . .

*Syria Chemical Attack: What We Know*, *supra* note 3.

319. Office of the Press Secretary, *supra* note 68; *see also* JOINT INTELLIGENCE COMM., *supra* note 68 (concurring the attacks "were conducted to help clear the Opposition from strategic parts of Damascus").

320. FRANCE DIPLOMATIE, *supra* note 14. As discussed earlier, the Syrian regime adopted a military strategy of chemical weapon warfare by (1) stockpiling equipment and delivering systems capable of chemical agent munitions; (2) pursuing a research and development program for producing multiple types of chemical weapons; and (3) assembling and maintaining one of the largest known chemical weapon stockpiles in the international community.

321. As an example of one of several instances predating the Ghouta attacks, chemical weapons were used allegedly at Khan al-Assal on March 19, 2013, which resulted in the beginning



reaction to Ghouta, President al-Assad was on clear notice of the abuses of such subordinates to do something about it. Consequently, al-Assad's only credible counter to the finding of the requisite *mens rea* would be to show that he made sufficient efforts to punish the involved subordinates both as a punitive measure and a deterrence from future insubordination. Given that there is no public information along these lines, it is unlikely that President al-Assad, in fact, did so.

C. *The Legal Obligation Component: al-Assad Failed to Fulfill His Duty to Take "All Necessary and Reasonable Measures" to Prevent or Punish Subordinates for the Offenses*

As the last component, the prosecution must demonstrate that in spite of al-Assad's "effective control" over his subordinates, and in light of his actual or constructive knowledge, he still failed to exercise such control as necessary and as reasonably to either "prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."<sup>322</sup> "Necessary and reasonable measures," however, maintain parameters difficult to delineate.<sup>323</sup> In broad and self-defining terms, the standard *requires* that an individual within a superior position take *all* necessary and reasonable measures "that are within [the superior's] material possibility . . . ."<sup>324</sup> As an affirmative duty, a failure to complete all such measures, in combination with the other components, results in criminal liability.<sup>325</sup> Although the principle was interpreted harshly against

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of a U.N. investigation. Wm. Robert Johnston, *Summary of Historical Attacks Using Chemical or Biological Weapons*, JOHNSTONS ARCHIVE (Nov. 30, 2016), <http://www.johnstonsarchive.net/terrorism/chembioattacks.html> [https://perma.cc/CR2E-8NMZ].

322. Under the Rome Statute, Articles 28(a)(ii) and (b)(iii) utilize identical language with regard to the legal obligation for both military commanders and superiors. Rome Statute, *supra* note 106, art. 28(a)–(b).

323. *Id.*

324. Blaškić Case, Appeal Judgment, *supra* note 194, ¶ 417 (quoting Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 395 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

325. See Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 395 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (discussing a superior's criminal responsibility for failing to take measures within his power to prevent his subordinates' crimes); Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 443 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) [hereinafter Kordić, Trial Judgment] (stating "it is the actual ability or effective capacity to take measures which is important" in determining if the superior took all necessary and reasonable measures). The Kordić court referenced duty of commanders under Protocol I:

The duty that rests on military commanders properly to supervise their subordinates is for instance expressed in Article 87 of Additional Protocol I, entitled 'Duty of commanders', which

defendants in its infancy,<sup>326</sup> the flexible standard of what is required to fulfill any such duty has since been seemingly relaxed in more modern tribunals.<sup>327</sup>

As mentioned above, if a harsher interpretation by the ICC is taken, it could give potential rise to an impossibility of performance defense.<sup>328</sup> However, under such a legal defense, the accused could face the scenario where they must choose which prong to legally admit to and which prong to attack. For instance, in the event that a superior lost “effective control” for the time relevant to their subordinate’s offenses, the superior would have to show that they had no “material ability” to issue orders that would be obeyed—excusing them from taking any preventative or punitive measures.<sup>329</sup> Alternatively, the accused could choose to legally admit to

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imposes an affirmative duty on them to prevent persons under their control from committing violations of international humanitarian law, and to punish the perpetrators if violations occur.

*Id.* ¶ 369 (citing Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 334 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

326. During the post-WWII Tokyo Tribunals, Koki Hirota, then-Foreign Minister for Imperial Japan, was tried and executed for his failure to pursue more insistent complaints to the Imperial Cabinet to take adequate steps to stop the Rape of Nanking. International Military Tribunal for the Far East Majority Judgment, Hirota, Koki, *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARGER, INDICTMENT AND JUDGMENTS, 603–04 (Robert Cryer & Neil Boister eds., 2008). Although Koki Hirota had no direct nor other actual authority over the military, as a high ranking civilian minister in the government, the tribunal found that he was more than aware of the atrocities in Nanking due to the receipt of regular reports. *Id.* Furthermore, although he sent an initial complaint to higher authorities, Hirota accepted “assurances” that steps would be taken in spite of his awareness that they were not. *Id.* The tribunal, in addition to other charges, found him guilty in being derelict of his duty for failing to make additional and more insistent efforts to complete the requisite “necessary and reasonable measures” of his legal obligation. *Id.* Hirota was consequently executed by hanging. *Id.* at 627.

327. See Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶¶ 183, 184, 230 (Int’l Crim. Trib. for Rwanda June 7, 2001) (acquitting the accused of superior responsibility liability due to a lack of sufficient command authority in the de jure superior-subordinate relationship and consequently finding no failure to take sufficient measures to prevent or punish, especially in light of a lack of resources).

328. Blaškić Case, Appeal Judgment, *supra* note 194 ¶ 417.

329. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 394–95 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). In the highly controversial trial of World War II, General Tomoyuki Yamashita, who was charged with Japanese atrocities committed in the Philippines, raised the defense that he had no effective control over troops due to a lack of effective communication with regard to some troops and a lack of formal authority over certain naval troops. UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1–2, 18 (1948). Though generating much controversy, the attempted defense was ultimately unsuccessful. *Id.* at 35.

“effective control,” but face the possible allegation that the orders given were insufficient to fulfill all “necessary and reasonable measures.”<sup>330</sup>

In the instant case, there is a lack of sufficient information to accurately predict President al-Assad’s defense on this issue. Assuming there was a rogue action within his regime, he may have taken some after-the-fact measures to prevent future occurrences. However, given the nature of his dictatorial presidency and the stakes of the Syrian conflict, it might have been a politically unacceptable loss of face for al-Assad to admit to even a momentary lack of control. This may have forced him to keep the public visibility of after-the-fact punishment to a minimum, thereby reducing its deterrence effect on future insubordinate troops.<sup>331</sup> In addition to admitting the possession of effective control, al-Assad runs the risk that the bias of the world community (and inevitably of the ICC judges) will interpret this as failing to fulfill the mandatory legal obligation. On the other hand, refuting the existence of effective control runs the risk of the court finding the opposite and, resultantly, a breach of his legal duties. President al-Assad, though not initially authorizing the rogue act, runs the risk of having effectively adopted the offense as his own through acquiescence.<sup>332</sup>

Nevertheless, from what is currently known, al-Assad, while maintaining at least the appearance of being in control, has not taken any publically visible steps to fulfill his mandatory obligation. In fact, what is known shows the complete opposite. President al-Assad has not only failed to punish and deter future chemical weapons use, chemical weapons use in Syria has aggressively continued in flagrant defiance of the newly joined Chemical Weapons Convention.<sup>333</sup> In at least one reported instance in

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330. See Čelebići Case, *supra* note 165, ¶ 196 (concluding “leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control”); Rome Statute, *supra* note 103, art. 28(b)(iii) (finding a superior liable when: “[t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”).

331. See Kordić, Trial Judgment, *supra* note 234, ¶ 371 (discussing situations where the “omissions of an accused in a position of superior authority [might] contribute to the commission of a crime” by, for instance, encouraging the perpetrator).

332. Failure of a commander to take the requisite measures to prevent or punish a subordinate could result in a legal “acquiescence” of the crime itself. See *id.* ¶ 389 (articulating the potential for a superior to be held criminally liable through acquiescence by aiding, abetting, encouraging, or failing to intervene in the commission of a crime).

333. A year following Ghouta and Syria’s agreement to surrender its chemical weapons, four previously undisclosed Syrian chemical weapons laboratories were discovered. *Syria Discloses Four Secret Chemical Weapons Facilities, UN Says*, THE GUARDIAN (Oct. 7, 2014), <https://www.theguardian.com>.

2014, a chlorine gas bomb was found to have been deployed by a Syrian regime helicopter.<sup>334</sup> The international community has additionally submitted evidence to the OPCW of numerous other allegations of chemical weapons use between December 2015 and August 2016.<sup>335</sup> These additional *post-Ghouta* episodes include: thirteen incidents involving the use of sarin, four incidents involving the use of VX, forty-one incidents involving the use of chlorine and sixty-one incidents involving the use of an unspecified chemical agent as a weapon.<sup>336</sup> The Syrian regime's continued and apparent course of performance,<sup>337</sup> as the ICC would likely find, would be highly persuasive—if not outright dispositive—of al-Assad's superior liability (if not direct liability) for the Ghouta attacks.

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com/world/2014/oct/07/syria-secret-chemical-weapons-facilities-un-says [https://perma.cc/ML5X-NLZC]. Three of the facilities were for research while the fourth was tasked with chemical weapon production. *Id.* Additionally, the UN and OPCW—in a joint investigative mission—conclusively found the use of “systematic[] and repeated[]” use of chlorine—another prohibited chemical weapons agent—in northern Syria. *Id.*; see also Colum Lynch & David Kenner, *U.S. and Europe Say Assad May Have Kept Some Chemical Weapons*, FOREIGN PUB. (Aug. 23, 2016), <https://foreignpolicy.com/2016/08/23/u-s-and-europe-say-assad-may-have-kept-some-chemical-weapons/> [https://perma.cc/3J4U-F938] (reporting Syria's steady increase in chemical weapons capability since joining the Chemical Weapons Convention and surrendering its stockpile post Ghouta). In at least one of these chlorine attacks, the UN-OPCW investigative team found “sufficient information for the Panel to conclude that the [chlorine gas attack at Talmenes] was caused by a Syrian Arab Armed Forces helicopter dropping a device causing damage to the structure of a concrete block building and was followed by the release of a toxic substance that affected the population.” Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, in letter dated Aug. 24, 2016 from the Leadership Panel of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism addressed to the Secretary-General, U.N. Doc. S/2016/738 (Aug. 24, 2016).

334. *Id.* at 18.

335. *Id.*

336. *Id.*

337. Under contract law principles, the course of dealing or course of performance by parties to an agreement can be indicative of an existing mutually understood-and-agreed term although it may not be explicitly mentioned or recorded. See U.C.C. § 1-303 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (discussing the use of course of performance in ascertaining the meaning of the parties' agreement); *United Nations Convention on Contracts for the International Sale of Goods*, 1489 U.N.T.S. 3, 61 (“In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”).

#### D. *The Head of State Immunity Problem*

Although the normal hurdles for attaching direct or superior liability are likely to be overcome, President al-Assad's position could offer a significant challenge. As a head of state, al-Assad will likely claim to be protected by sovereign immunity.<sup>338</sup> As the head of state, al-Assad's decisions and other conduct are arguably the acts of the Syrian state itself thereby making him immune from the jurisdiction of foreign courts.<sup>339</sup> While customary international law may be unclear on whether head of state immunity may be overcome,<sup>340</sup> there is substantial support for overcoming any such immunity.

One major instance under customary international law includes the indictment of President Slobodan Milošević of the Federal Republic of

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338. "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004) (citing Brief for Petitioners, App. A, at 1a). The Supreme Court provided a brief discussion on the origins of the sovereign immunity doctrine in *Pennhurst State Sch. & Hosp.*:

The doctrine of sovereign immunity developed in England, where it was thought that the King could not be sued. However, common law courts, in applying the doctrine, traditionally distinguished between the King and his agents, on the theory that the King would never authorize unlawful conduct, and that therefore the unlawful acts of the King's officers ought not to be treated as acts of the sovereign.

*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 142 (1984) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244 (George Sharswood, 1909)). The problem presented here is when the head of state himself is the one in violation of legal obligations.

339. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 142 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244 (George Sharswood, 1909)).

340. See Applicant's Motion Made Under Protest and Without Waiving of Immunity at 1–7, *Prosecutor v. Taylor*, SCSL-2003-01-I-015 (Spec. Ct. for Sierra Leone July 23, 2003) (arguing that under customary international law, the head of state—"derivative of the principle of State Immunity"—is absolutely immune from criminal prosecution); see also David Swanson, *Prosecution of George W. Bush by the International Criminal Court: An Open Letter to Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court*, GLOBAL RES. (July 17, 2008), <http://www.globalresearch.ca/prosecution-of-george-w-bush-by-the-international-criminal-court/9592> [<https://perma.cc/S6WU-2NTH>] (criticizing the inconsistent application of the ICC in its pursuit of prosecution over the president of Sudan and refusal to pursue any investigation of Former President George W. Bush and Former Vice President Dick Cheney). One counter-argument to this comparison is that the United States criminal justice system does not qualify as "unwilling or unable genuinely to carry out [an] investigation or prosecution." Jesse Oppenheim, *Despite Claims, ICC Prosecution of Bush, Blair Would Be Illegal*, JURIST-DATELINE (Sept. 13, 2012), <http://www.jurist.org/datetime/2012/09/jesse-oppenheim-desmond-tutu.php> [<http://perma.cc/83HF-RCHL>] (citing Rome Statute, *supra* note 103, art. 17).

Yugoslavia for war crimes and crimes against humanity.<sup>341</sup> This was the first case of prosecuting a head of state by the ICTY.<sup>342</sup> On the question of whether the ICTY could maintain jurisdiction over such a head of state, the Prosecutor publically justified the tribunal's authority under the initial UN resolution—creating the tribunal—and subsequent affirmations by UN Resolutions 1160 and 1199.<sup>343</sup>

The jurisdiction of this Tribunal is not conditional upon President Milosevic's consent, nor is it dependent on the outcome of any negotiations between him and anyone else. It is for the Judges of this Tribunal to interpret such jurisdiction and for the Security Council to modify or expand.<sup>344</sup>

The Special Court for Sierra Leone (SCSL) justified the inclusion of Former President Charles Ghankay Taylor of Liberia to be within the court's jurisdiction on similar grounds: "[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."<sup>345</sup>

In the case of the ICC, as an international criminal tribunal, jurisdictional authority is continued in the Rome Statute, which declares "official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility . . ."<sup>346</sup> However, it is

341. In addition to Slobodan Milošević, warrants of arrest for heads of state were also issued for Milan Milutinović, the President of Serbia, and Nikola Sainović, Deputy Prime Minister of the Federal Republic of Yugoslavia. Press Release, U.N., Int'l Crim. Trib. for the former Yugoslavia, President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo (May 27, 1999), <http://www.icty.org/en/sid/7765> [<https://perma.cc/MMG6-HPQ7>].

342. *Id.*

343. Press Release, U.N., Int'l Crim. Trib. for the former Yugoslavia, Prosecutor Seeks Assurance from President Milosevic Regarding Kosovo Investigations (Oct. 15, 1998), <http://www.icty.org/en/sid/7629> [<https://perma.cc/C3S3-FYCR>].

344. *Id.*

345. Prosecutor v. Taylor, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 52 (Spec. Ct. for Sierra Leone May 31, 2004).

346. Rome Statute, *supra* note 103, art. 27. In spite of their jurisdictional authority, there has still been some resistance by even States that have formally recognized the authority of these tribunals. For instance, Serbia and the Federal Republic of Yugoslavia—where Milošević took sanctuary—were resistant to complying with the ICTY's 1998 warrant until 2001. Press Release,

more realistic to anticipate numerous political obstacles in spite of the international community's legal obligation to cooperate with the ICC.<sup>347</sup> In a purely theoretical application, however, there is more than sufficient authority for the Prosecution to force the majority of the international community to cooperate in gaining custody of President al-Assad.

### VIII. CONCLUSION

Following World War I and World War II, the collective world horror at the atrocities and systematic magnitude gave birth to the United Nations, the organization created as a worldwide measure for the "prevention and removal of threats to the peace" as well as the promotion of a "respect for human rights."<sup>348</sup> Sadly, the U.N. has fallen short on many occasions in accomplishing its mission.<sup>349</sup> These shortcomings have included the proliferation of nuclear weapons and the international

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U.N., Int'l Crim. Trib. for the former Yugoslavia, Prosecutor Seeks Assurance from President Milosevic Regarding Kosovo Investigations (Oct. 15, 1998), <http://www.icty.org/en/sid/7629> [<https://perma.cc/C3S3-FYCR>]. The ICC is experiencing a similar resistance to trying its first indicted head of state. Omar Al Bashir, the former President of the Sudan, has thus far eluded the ICC despite two warrants for his arrest. Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05/01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010). At least one member of the international community has reportedly failed to cooperate with the ICC in executing Bashir's arrest. See Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05/01/09, Decision Requesting Observations About Omar Al-Bashir's Recent Visit to Malawi, at 4 (Oct. 19, 2011) (warning Malawi that further non-cooperation in arresting Bashir, as obligated under the Rome Statute, would be reported to the U.N.).

347. As Mahmoud Cherif Bassiouni observes:

Bartering away justice for political results, albeit in the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes. The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed terrible crimes to be committed. Thus, the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time.

M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 12 (1996) [hereinafter Bassiouni – *Searching for Peace*].

348. U.N. Charter, art. 1, ¶¶ 1, 3.

349. See Bassiouni – *Searching for Peace*, *supra* note 348, at 9, 10 (comparing the 20th Century death tolls of an estimated 170 million from non-international conflicts to an estimated 33 million military casualties); see also Jeremy Blackman, *Getting to No: Why Russia Loves the Veto*, PBS (Sept. 26, 2012 11:10 PM), <http://www.pbs.org/newshour/rundown/un-security-council-getting-to-no-why-russia-loves-the-veto/> [<https://perma.cc/TL77-2FMH>] (reporting Russia has overwhelmingly cast the most veto votes in the sixty-seven years of U.N. history, often in coordination with China, as a means of preventing Western activism as perceived by Russia and China).

failure to prevent genocide on more than one occasion.<sup>350</sup> However, by that same token, the U.N. and other international efforts have succeeded in keeping the world from the brink of destruction in the age of nuclear weapons and other weapons of mass destruction. Despite its sometimes huge hiccups, the U.N. and the international community have progressed the principles of international rule of law and an increasing international respect for it by its members, albeit in spurts.<sup>351</sup>

Though much has been done, more is needed. In addition to curbing worldwide the serious ongoing violations of human rights, the events at Ghouta offer a chance to set a landmark precedent in the prohibition of employing chemical weapons. Although a prohibition on modern chemical weapons use has existed for more than a century, it is ironic that it has been hard to enforce or even internationally codify<sup>352</sup> in spite of a modern history replete with violations.<sup>353</sup> Here, the International Criminal Court has the chance to stand against curbing human rights violations, as well as prohibited means of warfare, by charging President al-Assad with the following: (1) the crime against humanity of extermination; (2) the war crime of attacking civilians; and (3) the war crime of employing prohibited gases, liquids, materials or devices. The ICC's adjudication of the violations at Ghouta, however, offers the chance to not only deter future rogue state leaders from engaging in irresponsible behavior, but also to show, as a matter of precedent, that individual liability can still apply despite the traditional sovereign immunity afforded to a head of state.<sup>354</sup>

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350. See, e.g., *About the ICTY*, *supra* note 153 (discussing the acts of genocide and war crimes that took place during the 1990s in the Balkans).

351. *Id.*

352. See SCHABAS, *supra* note 241, at 280–81 (discussing the international disagreement on how to codify customary international rules on prohibited methods of warfare in drafting the Rome Statute).

353. See Bassiouni – *Searching for Peace*, *supra* note 348, at 10–11 (outlining the numerous crimes committed across internal armed conflicts since World War II and remarking on the very small number of prosecution of those crimes); Williams Robert Johnston, *Summary of Historical Attacks Using Chemical or Biological Weapons*, JOHNSTON ARCHIVES (Nov. 30, 2016), <http://www.johnstonsarchive.net/terrorism/chembioattacks.html> [https://perma.cc/CR2E-8NMZ] (listing numerous attacks utilizing chemical agents, many of which were never criminally prosecuted). *But see*, 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS: THE ZYKLON B CASE 93–94 (1947) (finding German industrialists guilty of war crimes for supplying Zyklon B, a deadly poison gas, for use at Auschwitz/Birkenau and other concentration camps).

354. Bassiouni – *Searching for Peace*, *supra* note 348, at 12–13.



As Mahmoud Cherif Bassiouni eloquently states: “[I]n a world order based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever that may be required in the aftermath of violence.”<sup>355</sup> Finally and along parallel reasoning, although the *tu quoque* argument has been declared legally void, maybe through prosecuting al-Assad, those remaining disbelieving nation-states and non-state actors will become convinced that it is actually true.

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355. *Id.* at 13.